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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

THE PACIFIC LUMBER COMPANY; MAXXAM GROUP INC.; MAXXAM INC.; CHARLES HURWITZ; PAUL N. SCHWARTZ; JAMES IACO; WILLIAM LEONE,
Petitioners,

VS.

CLARENCE KAYES; GENE KENNEDY; SHARON KENNEDY; WILEY LACY; JOHN R. MAURER; LESTER REYNOLDS; SHIRLEY REYNOLDS; HOLLIS ROLLINS; DONALD FILBY; JACK MILLER; JAMES LOVELL; PAUL S. BRADY; WILFRED A. BLAIN; LLOYD S. TUCKER; DONALD J. SCHOENHOFER,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit expand standing for private actions under section 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA") in contravention of *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985), and *Mertens v. Hewitt Assocs.*, 508 U.S. ____, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993), by allowing former participants and beneficiaries of a terminated ERISA plan to bring claims other than a claim for breach of fiduciary duty in connection with the purchase of a plan termination annuity contract and to seek remedies other than remedies designed to ensure receipt of all benefits under that annuity contract?

2. Did the Ninth Circuit expand ERISA's "prohibited transaction" rules beyond the scope of ERISA section 406 in violation of the rules of *Russell* and *Mertens* by holding that the future interest of the company sponsoring an ERISA retirement plan in the reversion of plan assets upon termination of the plan is an asset of the plan rather than an asset of the plan sponsor?

3. If a corporation is designated as the "named fiduciary" of a pension plan under ERISA section 402(a), are the officers and directors of that corporation individual fiduciaries as a matter of law if they take any action on behalf of, in the name of, or at the direction of the corporate named fiduciary so as to carry out the corporation's fiduciary responsibilities under ERISA?

PARTIES

The parties are The Pacific Lumber Company; MAXXAM Group Inc.; MAXXAM Inc.;[1] Charles Hurwitz; Paul Schwartz; James Iaco; and William Leone, Petitioners; and Clarence Kayes; Gene Kennedy; Sharon Kennedy; Wiley Lacy; John R. Maurer; Lester Reynolds; Shirley Reynolds; Hollis Rollins; Donald Filby; Jack Miller; James Lovell; Paul S. Brady; Wilfred A. Blain; Lloyd S. Tucker; and Donald J. Schoenhofer, Respondents.

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[1] Pursuant to Rule 29.1, petitioners state that MAXXAM Inc. and MAXXAM Group Inc. are the corporate parents of The Pacific Lumber Company. Specifically, The Pacific Lumber Company is wholly owned by a non-Party, MAXXAM Properties Inc., which is wholly owned by MAXXAM Group Inc., which in turn is wholly owned by MAXXAM Inc. The following parent, subsidiary or affiliate companies of The Pacific Lumber Company, MAXXAM Group Inc. or MAXXAM Inc. have issued shares to the public: MAXXAM Inc., Kaiser Aluminum Corporation, Kaiser Aluminum & Chemical Corporation, MAXXAM Group Inc., Horizon Corporation and Federated Development Company, The Pacific Lumber Company (Maine) (affiliate no longer exists, but had issued stock while in existence). Affiliates Kaiser Aluminum & Chemical Corporation, MAXXAM Group Inc., Horizon Corporation and Federated Development Company have been publicly held in the past but no longer have any shares held by the public outstanding.

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OPINION

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449 (9th Cir. 1995). A copy of the Slip Opinion is annexed hereto as Appendix A ("App. A").

JURISDICTION

The opinion of the Court of Appeals was filed on April 10, 1995. A timely petition for rehearing was denied by order filed June 15, 1995; a copy of the Order is annexed hereto as Appendix B ("App. B"). The district court's jurisdiction was based on section 502(a) of the Employee Retirement Income Security Act of 1974. Jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1). The district court's opinion is annexed hereto as Appendix C ("App. C").

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following statutes are involved in this case: ERISA section 3(7), 29 U.S.C. section 1002(7), ERISA section 3(21)(A), 29 U.S.C. section 1002(21)(A), ERISA section 402, 29 U.S.C. section 1102, ERISA section 405(c), 29 U.S.C. section 1105(c), ERISA section 406, 29 U.S.C. section 1106, and ERISA section 502(a), 29 U.S.C. section 1132(a). The pertinent text of these statutes is set forth in and annexed hereto as Appendix D ("App. D").

STATEMENT OF THE CASE

Factual Background. This case arises from the acquisition of The Pacific Lumber Company ("Pacific Lumber") by MAXXAM Group Inc. ("MGI"), and the termination of The Pacific Lumber Company Retirement Plan (the "Plan") in 1986 after all annuity benefits under the Plan were guaranteed to the beneficiaries by a state-licensed insurance company. In the Fall of 1985, MGI acquired all of the stock of Pacific Lumber. On March 20, 1986, the board of directors of Pacific Lumber voted to terminate the Plan, effective March 31, 1986. ER 100.[2] In compliance with ERISA sections 4044(d)(1) and 4041(b)(3)(A), Pacific Lumber initiated a lengthy process to select a state-licensed insurance company as the annuity provider to assume all of the annuity benefit obligations of the terminated Plan. ER 105-06.

By the terms of the Plan, Pacific Lumber was the "plan sponsor," "administrator," and "the named fiduciary" with the authority to control and manage the operation and administration of the Plan. ER 1122, 1436. The Plan further provided that Pacific Lumber was the "named fiduciary with respect to control over and management of the Plan's assets." ER 1123. Pacific Lumber could "engage such attorneys, actuaries, accountants, consultants or other persons to render advice or to perform services with regard to [Pacific Lumber's] responsibilities under the Plan . . . [and could] designate, by written instrument signed by both parties, one or more persons to carry out, where appropriate, fiduciary responsibilities of the Company." ER 1124.

When Pacific Lumber's "duties and responsibilities under the Plan [were] not delegated to other fiduciaries," the Plan provided that its duties and responsibilities were to "be carried out by the Company's directors, officers and employees, acting on behalf of and in the name of the Company in their capacities as directors, officers and employees and not as

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[2]Throughout this Petition, the following abbreviations are used: "ER" (Excerpts of Record filed with the Ninth Circuit); "CR" (Clerk's Record); and "App." which refers to the Appendix attached hereto.

individual fiduciaries." ER 1124. Pacific Lumber never delegated its fiduciary duty to select an annuity provider, and it never executed a written instrument designating any other person or entity to take over its fiduciary responsibilities. ER 1073-74.

Executives of Pacific Lumber, with assistance from some MAXXAM/MGI personnel, compiled the information necessary for the board of directors to make a decision regarding the selection of an annuity provider. ER 1310-11, 1065, 1269-70, 1284-86, 1323-25. In addition to consulting its counsel, Pacific Lumber hired a pension consultant, Wyatt & Co., to advise Pacific Lumber about the selection process on actuarial issues and to review bids from various insurance companies for compliance with the Plan provisions. ER 1269-70.

Based on this information, a list of ten insurance companies was created from which to obtain initial bids for group annuity contracts. ER 1065. The group of ten was then narrowed to six of the largest insurance companies in the United States: Aetna, Executive Life Insurance Company ("ELIC"), Equitable, Metropolitan Life, Pacific Mutual, and Prudential, all of which had the highest possible claims paying ratings from A.M. Best and Standard & Poor. These six highly qualified companies were asked to provide final round bids. As one part of its review, Pacific Lumber engaged Conning & Co., an insurance consultant, to provide information on the six final bidders. ER 249-50, 1065-66, 1340-41, 1369. Conning & Co. provided several analytical reports consistent with the ratings by A.M. Best and Standard & Poor, as all six companies received favorable reviews. ER 301-41. The final round bids were as follows: Aetna $43.2 million; ELIC $37.2 million; Equitable $45.8 million; Metropolitan Life $39.9 million; Pacific Mutual $39.9 million; Prudential $41.5 million. ER 105, 1066.

On October 1, 1986, Pacific Lumber, through its board of directors, reviewed the bids submitted by the six final bidders. Although ELIC was the low bidder, a Pacific Lumber employee had circulated a memorandum suggesting that employees would prefer Metropolitan Life to ELIC as the annuity

carrier. ER 1501-02. In deference to these suggestions, and after noting that the bid submitted by Metropolitan Life was approximately $2.7 million higher than that submitted by ELIC, the board directed that Metropolitan Life be asked if it would reduce its bid to within $800,000 of ELIC's bid. When Metropolitan Life declined, the board voted to select ELIC to provide the group annuity contract. ER 1066, 1279-81, 1289, 1291, 1330-31, 1333-34, 1437.

Those 1,142 participants in the terminated Plan whose benefits had an actuarial value of less than $3,500 (about 30% of the Plan's participants) received lump sum distributions and the remaining 2,681 received irrevocable contractual commitments from ELIC to pay their benefits. ER 1069-70. Plan assets in the amount of $37.2 million were transferred to ELIC as the premium for the group annuity contract. ER 150. The remaining assets of the Plan reverted to the company pursuant to the Plan documents and ERISA section 4044. ER 1133. ERISA expressly permits the reversion to the employer of "residual assets" (those assets remaining after payment of all plan benefit liabilities), where the plan permits a reversion, and the plan sponsor purchases an annuity from a state-licensed insurance company to provide benefits to participants in the terminated plan. *Mead Corp. v. Tilley*, 490 U.S. 714, 717-18, 109 S. Ct. 2156, 104 L. Ed. 2d 796 (1989); ERISA sections 4044 & 4041(b), 29 U.S.C. sections 1344 & 1341(b).

In July 1986, after the March 31 effective date of the resolution to terminate the Plan, but before the annuity purchase and asset reversion were concluded, Pacific Lumber entered into an Assignment Agreement with MXM Holdings Corporation, an affiliated company. Under the agreement, Pacific Lumber agreed to "assign[ ], transfer[ ] and convey[ ] to MXM [Holdings Corporation] *the right to receive* the Excess Pension Assets (as defined below) of The Pacific Lumber Company Retirement Plan . . . ." ER 1254 (emphasis added). Under the Assignment Agreement, "Excess Pension

Assets" were defined as the reversion belonging to Pacific Lumber after the completion of the Plan termination:

> "Excess Pension Assets" means, in each case determined after the approval by the Internal Revenue Service and the Pension Benefit Guaranty Corporation of the termination of the Plan, the total pension *assets held* under the trust funding the Plan *after the purchase of annuities and the payment of other distributions necessary to satisfy all pension liabilities with respect to participants and their surviving spouses and beneficiaries, ...*

ER 1255 (emphasis added).

MXM Holdings Corporation in turn executed a Pension Pledge and Security Agreement with Irving Trust Company ("Irving Trust"), on July 10, 1986, whereby it pledged its *right to receive* "Residual Pension Assets" as part of the collateral for a $100 million loan from Irving Trust and other commercial lenders (the "Irving Trust loan"). ER 1184, 1232-53, 1178-1231. The Pension Pledge and Security Agreement defined "Residual Pension Assets" as "Excess Pension Assets" less $25 million. ER 1242. "Excess Pension Assets" were defined in the Pledge Agreement exactly as that term had been defined in the Pacific Lumber Company Agreement, as set forth above. ER 1241.

In connection with the Irving Trust loan, considerable security in addition to the pledge of "Residual Pension Assets" by MXM Holdings Corporation was provided to Irving Trust. That additional security included marketable securities valued at no less than $50 million. CR 393, Exh. 4 at ¶ 3(g). MGI and MAXXAM Properties Inc. also served as guarantors of the Irving Trust loan. CR 393, Exhs. 5 and 6. As part of its guaranty, MGI covenanted that its net worth would be maintained at no less than $125 million. CR 393, Exh. 5 at § 3.4.

The Complaint. Almost four years after the termination of the Plan, seven plaintiffs out of the 2,681 annuity recipients brought this action. ER 1-2. Plaintiffs alleged that seven defendants breached their fiduciary duties: Pacific Lumber, its

corporate parents: MAXXAM and MGI; and four individuals, who, at the time of the complained-of conduct, held the following positions: Charles Hurwitz, chairman and director of defendant Pacific Lumber, and chairman, director and CEO of MAXXAM and MGI; William Leone, President and director of Pacific Lumber and MAXXAM; Paul Schwartz, Vice President of MAXXAM; and James Iaco, Treasurer and Vice President, Finance of MAXXAM. ER 1073, 1076.

Plaintiffs averred that defendants breached fiduciary duties under ERISA when defendant Pacific Lumber selected ELIC as the annuity provider upon the termination of the Plan (ER 113-115), contending that ELIC was an imprudent choice as an annuity provider because of its investment strategies, its reinsurance arrangements, and the level of its statutory surplus. ER 106, 108-110. The gravamen of plaintiffs' complaint was that defendants breached the fiduciary duty requirements of Title I of ERISA by purchasing an ELIC annuity when they "knew of or reasonably should have known of ELIC's uncertain financial health." ER 114-115. Plaintiffs also alleged that Pacific Lumber's receipt of the surplus plan assets, as well as the pledge of Residual Pension Assets, were "prohibited transactions" under ERISA section 406.

On April 11, 1991, four and one-half years after ELIC was selected, it was placed in conservatorship by the Commissioner of Insurance of the State of California. ER 100. The Commissioner temporarily stopped payment of annuity and other policy benefits on that date, but payments were resumed at a level of 70% in May 1991. ER 554. Pacific Lumber immediately took steps to protect its retirees. On April 18, 1991, one week after the conservatorship, Pacific Lumber voluntarily committed to make supplemental payments to retirees. CR 571, Exh. 7, ¶ 10. On July 31, 1991, after it became evident that Pacific Lumber's former cutting and welding subsidiaries would not take responsibility for their retirees, Pacific Lumber extended its voluntary supplemental payments to cutting and welding retirees.[3] CR 571, Exh. 7,

[3]Payments were retroactive to May 1, 1991. CR 571, Exh. 7, ¶ 17.

¶ 18. Since that time, it has made uninterrupted monthly payments to every Pacific Lumber retiree who has received less than full annuity benefits from ELIC or its successor after rehabilitation, Aurora National Life Assurance Company ("Aurora"). CR 571, Exh. 7, ¶¶ 9-12.

On June 12, 1991, the Secretary of Labor commenced an action against the defendants, again based on the selection of ELIC as the annuity provider on Plan termination. The Secretary's complaint did not include the prohibited transaction claims asserted by plaintiffs. The two cases were not consolidated; they were treated as related cases and proceeded under the same pretrial order and trial schedule.

ELIC was thereafter fully rehabilitated. ELIC's remaining assets have been transferred along with ELIC's policyholder obligations and contributions from the insurance guaranty funds of 43 states to Aurora, a newly formed insurance company. *Commercial Nat'l Bank v. Superior Court*, 14 Cal. App. 4th 393, 399-400, 17 Cal. Rptr. 2d 884 (1993), *reh'g denied*, 1993 Cal. App. LEXIS 399 (2d Dist. Mar. 22, 1993).[4]

The rehabilitating court observed that upon implementation of the Plan, Aurora "will rank among the safest life insurance companies in the United States," and that it ranked "first among the 20 largest pension writers surveyed, in its risk-based capital ratio," a key measure of solvency. CR 571, Exh. 9 at 18. Under the Plan, Aurora has continued ELIC's business, including the payment of retirement benefits. *Commercial Nat'l Bank*, 14 Cal. App. 4th at 400. Virtually all Pacific Lumber retirees, and all plaintiffs herein, who chose to participate in the rehabilitation Plan now receive 100% of their original expected benefits from Aurora. *Ibid.* Thanks to the

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[4]The Commissioner's Rehabilitation Plan includes an Enhancement Agreement whereby the insurance guaranty associations of 43 states (including California) provide additional assets to Aurora to augment the payments made to policyholders. The agreement is funded by assessments made by the individual state guaranty associations upon all life insurance companies which do business within the participating state. *Ibid.*

successful rehabilitation of ELIC and Pacific Lumber's voluntary supplemental payments, no retiree has lost a dime of pension annuity payments.

In this action, plaintiffs sought three substantive remedies: (1) a declaration that defendants "are personally liable to make good to the participants and beneficiaries any losses resulting from their breaches of fiduciary duty," (2) the appointment of "an independent master to seek new bids for a contract for annuities on behalf of the Plan's participants and beneficiaries, to be purchased by defendant MAXXAM," and (3) an "[o]rder [to] transfer from defendant ELIC to the winning bidder of all funds paid to ELIC for the annuities, or to MAXXAM upon MAXXAM's purchase of a new annuity contract." ER 121.[5] Plaintiffs did not seek remedies on behalf of the terminated Plan.

On February 9, 1993, plaintiffs filed their motion to certify this action as a class action. The district court denied the motion, holding that because actions for fiduciary breach must be brought on behalf of the Plan under ERISA section 502(a), plaintiffs' action must be brought as a derivative action under Federal Rules of Civil Procedure 23.1, rather than as a class action under Rule 23. ER 1447-69. The court also dismissed plaintiffs' second amended complaint without prejudice for failure to comply with the demand requirements of Rule 23.1, dismissed six plaintiffs as inadequate representatives, and required plaintiffs' counsel to withdraw from representation of a third party and from representing two plaintiffs in another action. *Ibid.*

On March 30, 1993, defendants moved for summary judgment on three grounds: (1) Plaintiffs lacked standing to maintain the action because ERISA section 502(a) gave standing to sue for breaches of fiduciary duty only to "participants and beneficiaries" of ERISA plans; after a plan is terminated, no participants or beneficiaries of the Plan exist

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[5]On June 17, 1993, plaintiffs voluntarily dismissed ELIC from this case, CR 544, mooting their last request for relief.

within the meaning of the statute;[6] (2) Six of the seven defendants, Charles Hurwitz, William Leone, Paul Schwartz, James Iaco, MAXXAM and MGI were not fiduciaries of the Plan; and (3) Plaintiffs' claims that defendants engaged in "prohibited transactions" in violation of ERISA section 406 were unfounded because defendants had not pledged, or otherwise adversely affected, any of the Plan assets. Pacific Lumber pledged only its own future interest in the reversion of the surplus, if any, remaining after all the liabilities to the terminated Plan beneficiaries had been fully guaranteed by the duly-appointed and statutorily-qualified insurer.[7]

On May 17, 1993, the district court granted defendants' motion for summary judgment on the ground that the plaintiffs lacked standing to maintain the action. App. C. The court also granted defendants' motion on the ground that defendants were not engaged in prohibited transactions in violation of ERISA, but it denied defendants' fiduciary status motion, holding that Messrs. Hurwitz and Leone were fiduciaries as a matter of law under ERISA; it reserved as factual issues for trial the fiduciary status of the remaining defendants.

Appeal. The case was briefed and argued before enactment of the addition of section 502(a)(9) to ERISA by the Pension

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[6]On April 14, 1993, after denying class certification, the court permitted plaintiffs to file a third amended complaint to comply with the procedural requirements of Rule 23.1. ER 1457, 1469. In this complaint, filed a month after defendants had filed their Motion for Summary Judgment for Lack of Standing, plaintiffs for the first time prayed for a constructive trust remedy. *See* ER 1557-58. Plaintiffs seek a constructive trust over at least $2.7 million (plus interest since 1987) notwithstanding that the effect of such an exaction of distributions from such a trust would be to pay participants and beneficiaries more than 100% of their vested retirement benefits.

[7]On December 29, 1992, defendants had filed a summary judgment motion contending that the interpretations of ERISA essential to plaintiffs' complaint were impermissible under the McCarran-Ferguson Act. The district court denied this motion on March 8, 1993. ER 742. The Ninth Circuit affirmed. App. 12-17.

Annuitants Protection Act of 1994 ("PAPA"), Pub. L. No. 103-401 (Oct. 22, 1994), *codified at* 29 U.S.C. section 1132(a)(9).[8] Respondents, appellants below (hereafter "respondents"), argued that the district court erred in denying the asserted class, in denying class representative status to some of the putative class representatives, in dismissing the two prohibited transaction claims, and in dismissing their action in its entirety for lack of standing. Defendants/Petitioners (hereafter "petitioners"), cross-appealed. They argued, *inter alia*, that the district court's holding that Messrs. Hurwitz and Leone were Plan fiduciaries as a matter of law was erroneous and that the named officers and members of the board of Pacific Lumber were not Plan fiduciaries within the meaning of ERISA.

Respondents contended that they should have been granted standing to bring this action, thereby conferring subject matter jurisdiction on the district court, because they were situated similarly to plaintiffs in *Amalgamated Clothing & Textile Workers Union v. Murdock*, 861 F.2d 1406, 1408 (9th Cir. 1988), in which former participants of a terminated plan were permitted to pursue the equitable remedy of a constructive trust imposed on a plan fiduciary's impermissible profits. Even if Pacific Lumber's future interest in the reversion of surplus assets was not technically a Plan asset, the respondents argued, it should be treated as if it were an asset of the Plan to prevent any temptation to use alleged Plan assets in corporate takeovers. Finally, Respondents urged the court to hold corporate officers and directors personally liable for breach of fiduciary duty whether or not they actually controlled the annuity purchase which was allegedly imprudent.

Petitioners responded that respondents could not bring themselves within the *Murdock* exception, and, even if *Murdock* could be stretched to respondents' case, the continued vitality of *Murdock* was impaired by *Mertens v. Hewitt As-*

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[8] As the Ninth Circuit noted, the legislative history of PAPA indicates that it was enacted and given retroactive effect specifically to reverse the district court's ruling in this case. App. 11-12 & n.4.

socs., 508 U.S. ____, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993) (former employees of an inadequately-funded ERISA pension plan had no standing to bring an action for monetary damages against non-fiduciaries who knowingly participated in the named fiduciary's misconduct). Petitioners argued that in *Mertens* and in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985), the Court required that ERISA be read strictly; the judiciary is not empowered to imply remedies Congress itself has not given in drafting this comprehensive statutory scheme. ERISA does not permit courts to create "constructive" plan fiduciaries or "constructive" plan assets. The individual officers and directors sued in this case were not named as pension plan fiduciaries, nor did they act individually in that capacity in the selection of ELIC as the guarantor of all annuity benefits to the employees covered by the terminated plan.

Ninth Circuit Opinion. The court held that the PAPA amendment of section 502(a) conferred standing on respondents to maintain this action, although the impact of PAPA on the standing issue had neither been briefed nor argued (PAPA was enacted after the case was submitted for decision to the Ninth Circuit). Petitioners' offer to brief the point was not accepted even though the issue controls subject matter jurisdiction of the court. Without discussing *Mertens* or *Russell*, the court held Pacific Lumber's pledge of its future interest in surplus assets, if any, remaining after the liability to the beneficiaries of the terminated Plan had been discharged by securing statutorily-authorized insurance was a pledge of a plan asset under section 406. Although the court recognized that the transactions attacked did not jeopardize the assets of the Plan and had no effect on the respondents' vested benefits, the court nevertheless held that the reversionary interest in the surplus was a "plan asset" because neither the pledge nor the loan that it was given to secure benefited the Plan, and because "[c]orporations should not be permitted to rely on

their ERISA plan assets to finance takeovers or other risk adventures." App. 37.[9]

The court also held that Messrs. Hurwitz and Leone were fiduciaries of the Plan as a matter of law because they were acting on behalf of the corporation as officers or directors of the named fiduciary when they voted to select ELIC. The court acknowledged that, in reaching that conclusion, the panel placed the Ninth Circuit in direct conflict with *Confer v. Custom Eng'g Co.*, 952 F.2d 34 (3d Cir. 1991).

REASONS FOR GRANTING THE WRIT

Introduction. The interpretation and application of ERISA have profound effects on millions of employees who are beneficiaries of private employee benefit plans and on employers who have invested billions of dollars in those plans. ERISA is a complex statute with interlocking, dependent provisions which was enacted after many years of study and debate. The legislation effectuates many delicate compromises that Congress made between the interests of employees benefited by such plans and their employers.

This Court has made crystal clear that lower federal courts are not to tamper with the congressional scheme by broadening either the substantive rights of employees or the remedies available as prescribed by the statute itself, because to do so would upset the delicate congressional balance of interests that ERISA reflects.

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[9] In reaching this holding and its ruling on the prohibited transaction claims, the Ninth Circuit appeared to rely on the "facts" set out at the start of its opinion as if they were facts found by the district court. They were not. The Ninth Circuit's recitation includes many "facts" that are nothing more than allegations in plaintiffs' various complaints. It may have been proper to assume that such facts were true for purposes of reviewing a grant of a summary judgment motion brought by *defendants*, but it was wholly improper to rely on those allegations to support a summary judgment in *plaintiffs'* favor.

The congressional purposes in enacting ERISA, and its later amendments, cannot be achieved without drawing clear, bright lines to permit both employees and employers to know what conduct or transactions involving employee benefit plans are forbidden, and those that are not, and to make explicit the persons who can state claims for relief for actions that arguably violate the statute and against whom such actions may be brought.

The circuits are in irreconcilable conflict with respect to each of the questions presented for review by this Petition. The conflicts are now ripe for resolution by this Court because further percolation of those issues can do nothing more than exacerbate the disarray in the circuits generating even more litigation which confuses, rather than enlightens, all of the persons who are subject to ERISA.

A. The Ninth Circuit Has Impermissibly Extended Its Subject Matter Jurisdiction by Conferring Standing on Respondents to Pursue Implied Substantive Rights and Remedies Not Granted by ERISA

Standing is one of the most important of the jurisdictional doctrines. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-31, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990). A federal court has no subject matter jurisdiction of an action that a plaintiff lacks standing to pursue. *Warth v. Seldin*, 422 U.S. 490, 498-500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). Federal courts have no subject matter jurisdiction over ERISA actions filed by persons not specifically authorized to bring suit by section 502(a). *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 26-28, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983).

Russell, 473 U.S. 134 (1985), and *Mertens*, 113 S. Ct. 2063 (1993), require ERISA's standing provisions to be strictly construed. Contrary to this Court's explicit instructions, the Ninth Circuit has conferred standing to pursue substantive rights that ERISA has not given and to obtain remedies that Congress did not provide in ERISA.

The district court correctly granted petitioners' summary judgment motion on the ground that the respondents did not have standing to assert any claims under ERISA section 502(a) because, at that time, ERISA authorized only "participants" in or "beneficiaries" of an employee benefit plan to bring a civil action alleging a breach of fiduciary duty. ERISA section 502(a)(2)(3). ERISA defined a "participant" as "any employee or former employee of an employer . . . *who is or may become eligible to receive a benefit of any type from an employee benefit plan* which covers employees of such employer . . . or whose beneficiaries may be eligible to receive any such benefit." ERISA section 3(7), 29 U.S.C. section 1002(7)(emphasis added). The respondents did not fit the statutory description.

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989), the Court held that the quoted language from section 3(7), "may become eligible," describes a claimant with a colorable claim that "he or she will prevail in a suit for *benefits*." A plaintiff without a colorable claim to vested benefits "simply does not fit within the [phrase] 'may be eligible.' " *Firestone*, 489 U.S. at 118, *quoting Saladino v. I.L.G.W.U. Nat'l Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985).

Former participants and beneficiaries in a terminated plan cannot become eligible to receive a benefit from a plan and are, therefore, not "participants" or "beneficiaries" within the meaning of ERISA section 3(7). *Teagardener v. Republic-Franklin, Inc. Pension Plan*, 909 F.2d 947 (6th Cir. 1990), *cert. denied*, 498 U.S. 1027, 111 S. Ct. 678, 112 L. Ed. 2d 670 (1991); *Kuntz v. Reese*, 785 F.2d 1410 (9th Cir.), *cert. denied*, 479 U.S. 916, 107 S. Ct. 318, 93 L. Ed. 2d 291 (1986), *cited with approval in Firestone*, 489 U.S. at 118.[10]

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[10]The regulations of the Department of Labor, the agency with statutory authority to interpret and enforce ERISA, provides the same interpretation. "The Department of Labor has promulgated certain regulations pertaining to the administration of ERISA. These regulations specifically exclude from the definition of 'participant' any person

After this case was briefed and argued, Congress amended section 502(a) to add subparagraph (9) (the "PAPA" amendment, Pub. L. No. 103-401 (Oct. 22, 1994)), which conferred standing on a narrowly defined class of employees to seek a carefully circumscribed remedy. PAPA grants standing only to participants or beneficiaries on the date that the ERISA plan sponsor bought an insurance contract under circumstances that allegedly constituted a violation of fiduciary duty owed to the plan and also terminated that person's status as a participant or beneficiary. The remedy was limited to assurance that the participant or beneficiary, thus defined, would receive the amounts to be provided by such an insurance contract.[11]

'to whom an insurance company has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan.' 29 C.F.R. § 2610.2 (1985); *see Joseph [v. New Orleans Elec. Pension & Retirement Plan]*, 754 F.2d [628] at 630 [(5th Cir.), *reh'g en banc denied*, 761 F.2d 695, *cert. denied*, 474 U.S. 1006, 106 S. Ct. 526, 88 L. Ed 2d 458 (1985)] (quoting Department of Labor regulation)." *Kuntz*, 785 F.2d at 1411-12.

In 1991, the Department of Labor reaffirmed this definition in a notice of proposed rulemaking: "Generally, under current Department regulations, a participant or beneficiary ceases to be a participant covered under an employee pension plan or a beneficiary receiving benefits under such plan *if the entire benefit rights of the individual are fully guaranteed by an insurance company 'licensed to do business in a state.'*" 56 Fed. Reg. 28,638 (June 21, 1991) (emphasis added).

[11] ERISA section 502(a)(9) provides that:

> "A civil action may be brought —
>
> (9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this subtitle or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts."

The sole effect of PAPA was to resuscitate respondents' claim that petitioners breached ERISA fiduciary duties when Pacific Lumber bought the plan termination annuity from ELIC.[12] PAPA did not and could not raise any of respondents' other ERISA claims from the dead. Pacific Lumber's use of its reversionary interest in assets surplus to the Plan after purchase of the annuity is not "a purchase of an insurance contract or insurance annuity," and it could not trigger section 502(a)(9). Nothing in PAPA purported to confer standing on respondents to maintain an action challenging the pledge of the reversion as a prohibited transaction.

The opinion below disregards the limitations of PAPA and treats the amendment as if it gave standing to respondents to assert claims that were not based on a claimed violation of fiduciary duty in purchasing the annuity from ELIC. It likewise disregards the explicit directions of *Russell* and *Mertens* that federal courts are not permitted either to imply standing to assert claims for relief or to seek remedies that were not explicitly provided by Congress in ERISA. As the *Mertens* Court stated: "[T]he authority of courts to develop a 'federal

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[12] Although congressional action temporarily resuscitated respondent's breach of fiduciary duty claim on that point, it supplied no other nourishment to respondents' case. As the Ninth Circuit itself recognized, these plaintiffs have not lost any benefits, and even the fragmentary record shows that future losses of any of their benefits are exceedingly improbable. Moreover, respondents must convince a court that there was something imprudent about the purchase of the annuity from ELIC because Pacific Lumber failed to foresee that, years after the decision was made, events would occur that would temporarily impair a significant amount of ELIC's investment portfolio. None of the rating agencies or any of the other experts had crystal balls any clearer than Pacific Lumber's when the challenged decision was made. E. Veal & E. Mackiewicz, *Pension Plan Terminations* § 16.1 (1994 Supp.) ("Until January 1990, [Executive Life] enjoyed generally high marks from most firms that rate the strength of insurers. It seems unlikely that even the most zealous fiduciary would have discovered flaws in the company's financial structure that escaped the notice of those experts most familiar with the insurance industry.").

common law' under ERISA . . . is not the authority to revise the text of the statute." *Mertens*, 113 S. Ct. at 2070.

The proper question under ERISA is not whether the language of the statute bars respondents' action, but "whether the statute affirmatively *authorizes* such a suit." *Mertens*, 113 S. Ct. at 2068 n.5 (emphasis in original). Prior to PAPA, ERISA manifestly did not grant respondents standing because section 502(a) authorizes suit only by participants and beneficiaries, not former participants and beneficiaries. Just as plainly, the only suit PAPA authorizes is an action alleging a breach of a fiduciary duty in connection with the purchase of an annuity policy to discharge the liabilities to the former beneficiaries of the terminated plan. Former beneficiaries asserting such a claim are entitled to obtain only such remedies as are designed to ensure receipt of the full annuity benefits to which they were entitled. In granting standing to the respondents to pursue all their theories of claimed ERISA liability, and all their claimed remedies, the lower court acted in excess of its subject matter jurisdiction.

B. The Ninth Circuit's Expansion of ERISA's Prohibited Transaction Rules Is Contrary to This Court's Holdings and in Conflict with Other Circuits

Key ERISA provisions are the "prohibited transaction" rules set out in ERISA sections 406 through 408. Section 406 sets out a list of transactions which are flatly prohibited. Any proposed transaction that falls within section 406 becomes a *per se* violation of ERISA upon consummation. Penalties are draconian: The transaction must be rescinded and the Internal Revenue Service may assess penalties up to 100% of the amount involved in the transaction.

The purpose of section 406 was, to the extent possible, to eliminate harmful self-dealing by ERISA plan fiduciaries through a series of bright-line rules against which fiduciaries and those doing business with fiduciaries can test proposed transactions. *See Commissioner v. Keystone Consol. Indus.*, 508 U.S. ____, 113 S. Ct. 2006, 2012, 124 L. Ed. 2d 71 (1993) ("Congress' goal [in enacting section 406(a)(1)(A)]

was to bar categorically a transaction that was likely to injure the pension plan."); *see* S. Rep. No. 127, 93rd Cong., 2d Sess. (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4866 ("There follows a list of proscriptions which represent the most serious type of fiduciary conduct .... [T]he seriousness of the improper practices indicates the need for additional precautions to insure that these specific examples do not become general conditions.")

Section 406 states in pertinent part[13] as follows:

> **§ 406. Prohibited transactions**
>
> **(a) Transactions between plan and party in interest.** Except as provided in section [4]08 of this title:
>
> (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —
>
> . . .
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or
>
> . . .
>
> **(b) Transactions between plan and fiduciary.** A fiduciary with respect to a plan shall not —
>
> (1) deal with the assets of the plan in his own interest or for his own account,
>
> . . .

To hold that a transaction violates section 406, therefore, the court must find that (1) a fiduciary (2) has used assets of an ERISA plan (3) for the purpose of serving the fiduciary's own benefit rather than the benefit of the plan. If any element is missing, the transaction is not prohibited by section 406. *Brock v. Citizens Bank*, 841 F.2d 344, 347 (10th Cir.), *cert.*

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[13]The Ninth Circuit opinion simply references section 406. The allegations below were based specifically on ERISA sections 406(a)(1)(D) and 406(b)(1). ER 117-120.

denied, 488 U.S. 829, 109 S. Ct. 82, 102 L. Ed. 2d 59 (1988) ("unless the act complained of falls within the specific list of dealings proscribed by [section 406] . . . the transaction does not constitute a per se violation of ERISA").

The term "assets of the plan" is not statutorily defined, but the legislative history of the provision indicates that the term is to be given its plain meaning. *See* H.R. Rep. No. 533, 93rd Cong., 2d Sess. (1973), *reprinted* in 1974 U.S.C.C.A.N. 4639, 4659 (hereafter "*House Report*") (prohibited transaction clauses refer to "fund" of "investments").[14]

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[14]Other federal courts have consistently held that when a plan provides that surplus assets will revert to the plan sponsor after termination, the future interest in a possible reversion is a vested property interest of the plan sponsor. *Federal Deposit Ins. Corp. v. Marine Nat'l Exch. Bank*, 500 F. Supp. 108 (E.D. Wis. 1980) (FDIC as receiver of failed bank owned right to reversion of surplus in bank's pension plan and could sell surplus in liquidating bank); *Young v. Paramount Communications* (*In re Wingspread Corp.*), 155 B.R. 658, 664 (Bankr. S.D.N.Y. 1993) (corporation's "interest in the reversionary assets . . . [was] an intangible property interest that was freely alienable"); *Northwest Acceptance Corp. v. Lansdowne* (*In re Northwest Acceptance Corp.*), 93 B.R. 243, 248 (Bankr. D. Or. 1988) (bankrupt plan sponsor held a reversionary interest in assets of trust of ERISA plan which were validly pledged pre-bankruptcy as part of a pledge of general intangibles); *In re Long Chevrolet, Inc.*, 79 B.R. 759 (N.D. Ill. 1987) (pre-bankruptcy pledge of general intangibles including right to future reversion from trust under ERISA plan valid under ERISA and not a preference in bankruptcy).

These rulings follow settled principles of trust and property law, against which background ERISA must, where applicable, be construed. *Firestone*, 489 U.S. at 110-111 (citing *Restatement of Trusts 2d* and *V Scott on Trusts* as authority in determining the appropriate standard of review of discretionary trustee decisions). A future interest in the reversion of property is a present, vested property interest which under trust law may exist in personalty and is descendible, devisable, alienable and assignable. *See Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir.), *reh'g en banc denied*, 42 F.3d 639 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1699, 131 L. Ed. 2d 561 (1995) (citing *Restatement of Trusts 2d* (2d ed. 1959) § 430 in characterizing employer's present interest in reversion of surplus); *Wilson v. Bluefield*

Pacific Lumber's Plan *never* could have owned the future interest in the reversion of surplus assets remaining after the Plan had been terminated and a qualified insurer had taken over all of the Plan's liabilities to the beneficiaries. Nevertheless, the Ninth Circuit held that the pledge of Pacific Lumber's future interest in the reversion was a pledge of a Plan asset within the meaning of section 406, because that use of the reversion did not benefit the Plan. That holding makes no more property law sense than a holding that a person with a life estate in real property inherits the reversion when he dies.

The opinion itself recognized that the transaction at issue did not jeopardize assets of the Plan, or affect plaintiffs' vested benefits under the Plan, and that the Plan assets themselves were never at risk. App. 36-37. In holding that the reversion was a "Plan asset," the Ninth Circuit rewrote the statute and several hundred years of settled property and trust law. The court's reason for doing so is explicit: "Corporations should not be permitted to rely on their ERISA Plan assets to finance takeovers or other risk ventures." App. 37. The court's purpose was not the purpose of Congress in enacting ERISA.

The Ninth Circuit's rewriting of section 406 disobeys *Russell* and *Mertens*, which could not have stated more plainly that the federal judiciary is not permitted to tamper with the statute's "carefully crafted and detailed enforcement scheme." *Mertens*, 113 S. Ct. at 2067, *quoting Russell*, 473 U.S. at 146-47. As the *Mertens* Court explained in no uncertain terms:

> [P]etitioners and [the Department of Labor as amicus curiae] ask us to give a strained interpretation to §502(a)(3) in order to achieve the "purpose of ERISA to protect plan participants and beneficiaries." ... [T]hey contend our construction of §502(a)(3) leaves beneficiaries

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Supply Co., 819 F.2d 457, 464 (4th Cir. 1987) (same); *Creasy v. Coleman Furniture Corp.*, 763 F.2d 656, 662 & n.6 (4th Cir. 1985) (debtor presently owns future interest in surplus assets of ERISA plan); *In re Northwest Acceptance Corp.*, 93 B.R. at 248; Am. Jur. 2d *Estates* §§ 171, 172, 173 (2d ed. 1966); *Restatement of Trusts 2d, supra*, §§ 407, 430; *V Scott on Trusts* (4th ed. 1989) §§ 407, 430.

like petitioners with *less* protection than existed before ERISA, contradicting ERISA's basic goal of "promot[ing] the interests of employees and their beneficiaries in employee benefit plans.

"... [V]ague notions of a statute's "basic purpose" are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration .... This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests — not all in favor of potential plaintiffs .... We will not attempt to adjust the balance between those competing goals that the text adopted by Congress has struck.

Mertens, 113 S. Ct. at 2071-72 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515, 101 S. Ct. 1895, 68 L. Ed. 2d 402 (1981)) (citations omitted).

Other circuits have heeded this Court's requirement that the provisions of section 406 are to be strictly construed as bright-line rules against which fiduciaries and those doing business with them can test proposed transactions. *Donovan v. Cunningham*, 716 F.2d 1455, 1465 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251, 104 S. Ct. 3533, 82 L. Ed. 2d 839 (1984). If a transaction is not on the statutory prohibited list it cannot be a prohibited transaction. *Brock*, 841 F.2d at 347; *accord Evans v. Bexley*, 750 F.2d 1498, 1550 n.3 (11th Cir. 1985); *Donovan v. Bierwirth*, 680 F.2d 263, 270 (2d Cir.), *cert. denied*, 459 U.S. 1069, 103 S. Ct. 488, 74 L. Ed. 2d 631 (1982).

The decision below deepens the existing conflict among the circuits regarding construction of section 406. The Ninth, Seventh and Second Circuits have held that section 406 "should be read broadly ... as a gloss on the duty of loyalty required by section 404 ... [We] would be reluctant to construe narrowly any protective provisions of the Act." *Leigh v. Engle*, 727 F.2d 113, 126 (7th Cir. 1984); *accord Lowen v. Tower Asset Management*, 829 F.2d 1209, 1212-13 (2d Cir. 1987). The Tenth and Eleventh Circuits have held to the

contrary, requiring that the accused transaction be included in Congress' "specific" list of prohibitions. *Brock*, 841 F.2d at 347; *Evans*, 750 F.2d at 1500 n.3.[15]

These inconsistent federal decisions ironically are recreating at the federal level the problem ERISA sought to eradicate at the state level: "Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law . . . ." *House Report, supra*, at 4655. "The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants *to predict the legality of proposed actions* without the necessity of reference to varying state laws." *Ibid.* at 4650, *cited in Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) (emphasis added).

C. The Ninth Circuit's Extension of ERISA Fiduciary Status to Persons Who Were Not Plan Fiduciaries Violates This Court's Rule Requiring Strict Construction of ERISA and Is in Direct Conflict with the Third Circuit

ERISA section 402(a)(1) provides that every employee benefit plan must have a named fiduciary: "a fiduciary who is named in the [employee benefit] plan instrument." ERISA section 402(a)(2), 29 U.S.C. section 1102(a)(2). A named fiduciary is accorded the "authority to control and manage the operation and administration of the Plan." ERISA section 402(a)(1). It may designate, pursuant to the terms of the Plan, persons other than itself to carry out its fiduciary responsibilities. ERISA section 405(c)(1)(B), 29 U.S.C. section 1105(c)(1)(B). Under ERISA section 3(21)(A)(i) and (ii), a person is a fiduciary with respect to a particular plan "to the extent" that he (a) has discretionary authority or control respecting plan management, (b) exercises any authority or control respecting the management or disposition of its assets, or (c) has any discretionary

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[15]The Second Circuit actually appears to have a conflict internal to the circuit on this point. *Compare Lowen*, 829 F.2d at 1213 *with Donovan v. Bierwirth*, 680 F.2d at 270.

authority or responsibility in administration of the plan. ERISA section 3(21)(A), 29 U.S.C. section 1002(21)(A).

In *Mertens*, this Court acknowledged that the ERISA definition of fiduciary was "artificial" and that it limited the breadth of persons or entities having a duty to ERISA plan beneficiaries and thereby subject to liability for breaches of fiduciary. *Mertens*, 113 S. Ct. at 2068 n.5. In contrast to the result under general trust law, the result under ERISA is that "persons who ha[ve] no real power to control what [a] plan d[oes]" are not liable for any damages suffered by a plan as a direct or consequential result of any action in which they may have played a part. *Mertens*, 113 S. Ct. at 2072.

The Fifth and Seventh Circuits strictly construe ERISA section 3(21)(A). As the Fifth Circuit explained in *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 352 (5th Cir. 1989), the "to the extent" language from ERISA section 3(21)(A) means that "a person is a fiduciary only with respect to those aspects of the plan over which he exercises authority or control." In *Schloegel v. Boswell*, 994 F.2d 266, 271 (5th Cir.), *cert. denied*, ____ U.S. ____, 114 S. Ct. 440, 126 L. Ed. 2d 374 (1993), the Fifth Circuit further stated, "Mere influence over the [named fiduciary's] decisions .... is not effective control ...." The question whether a person or an entity has "effective control" over a fiduciary cannot be ascertained without engaging in a "fact-intensive inquiry that looks to see whether the [purported fiduciary] transcended her ordinary functions." *Schloegel*, 994 F.2d at 271, *quoting Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 537 (7th Cir. 1991).

The Seventh Circuit agrees with the Fifth in strictly construing ERISA section 3(21)(A) and in carefully distinguishing between an ERISA fiduciary, as defined by that section, and a person who is a fiduciary for other purposes. For example, in *Pappas*, the court interpreted the statutory terms "discretionary authority," "discretionary control," and "discretionary responsibility" to refer to "*actual* decision-making power, rather than to the *influence*" that a person may have

over decisions made by plan fiduciaries. *Pappas*, 923 F.2d at 535 (emphasis added).

When a corporation is the named plan fiduciary, it can act only through its officers and directors. Corporate officers and directors in turn owe a fiduciary obligation to the corporation. However, the fact that the officers and directors are fiduciaries of the corporation does not mean that they are also fiduciaries of the plan. As the Second Circuit explained in *Birmingham v. SoGen-Swiss Int'l Corp. Retirement Plan*, 718 F.2d 515, 522 (2d Cir. 1983), ERISA's provision regarding named fiduciaries must be read with sufficient precision to permit fixing "responsibility for managing and operating the [p]lan" with a reasonable degree of certainty. For that purpose, as *Mertens* teaches, only those persons who have real power to control what a plan does can be subjected to liability as plan fiduciaries. *Mertens*, 113 S. Ct. at 2072.

According to the Ninth Circuit, however, all officers and directors of a corporate named fiduciary slip into the named fiduciary's shoes and become individual ERISA fiduciaries, regardless of the role that the person may have played in the decision of the plan fiduciary. In holding that Messrs. Hurwitz and Leone were fiduciaries within the meaning of ERISA, as a matter of law, the court made its views plain that the corporate officer or director title was enough, by itself, to convert the officer or director individually into a fiduciary for the purpose of liability under the statute, whether or not the individuals or entities personally had any actual control over the corporate named fiduciary here, *i.e.*, Pacific Lumber.

The record before the Ninth Circuit provided no evidence that the persons charged with being ERISA fiduciaries in this case had any actual individual power to control the decision by Pacific Lumber, the named fiduciary, to enter into the challenged transactions. All the record shows is that Messrs. Hurwitz and Leone exercised the duties they owed the corporation as either directors or officers and that individual directors voted as board members. The decision of a board of directors is, of course, a decision of the majority of the board acting as a unit, not an independent, individual decision of

each board member. 2 *Fletcher, Cyclopedia Corporations* § 392 (perm. ed. 1990). If the powers and duties of the named fiduciary were to devolve on every officer and member of the board individually, the essential focus of ERISA responsibility and liability would be dissipated.

The Third Circuit, unlike the Ninth, applied those principles precisely in *Confer v. Custom Eng'g Co.*, 952 F.2d 34 (3d Cir. 1991). *Confer* held that since a corporation designated as a "named fiduciary" cannot exercise its ERISA fiduciary responsibilities and duties except through the acts of its officers, directors and employees, the acts of those persons in fulfilling their responsibilities and duties as officers and directors of the corporation are not acts of fiduciaries under section 3(21)(A). *Confer*, 952 F.2d at 37. Instead, their acts are considered acts of the corporation named as plan fiduciary. *Ibid.*[16]

Here, none of the individual defendants, nor MGI and MAXXAM, had any authority or control as an individual/entity to select ELIC as the annuity provider. Only Pacific Lumber had the ability to select ELIC as the annuity provider and enter into a contract with it on behalf of the Plan; it never delegated those duties to any of the other defendants. ER 1074, 1122-24, 1436. In preparation for the corporate decision regarding annuity providers, the individual defendants, as well as various Pacific Lumber officers *not* named as defendants, collected pertinent information regarding the various insurance companies and annuity options and participated in discussions regarding such information with Pacific Lumber's board of directors. ER 1065, 1269-70, 1284-86, 1310-11, 1323-25. In doing so, they acted as Pacific Lumber's "faculties" and advisors. 2 *Fletcher, supra*, § 268. As "faculties" and advisors, none of the individual defendants, nor MGI or

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[16] *Confer* recognized that where a corporate named fiduciary has designated fiduciary duties to an individual officer, such as serving as the plan administrator, that officer would then become an ERISA fiduciary. *Ibid.*

MAXXAM, exercised any control over the annuity selection, nor did their roles provide them with any power to do so.

Similarly, as members of Pacific Lumber's board of directors, neither Mr. Hurwitz nor Mr. Leone had any individual discretion or control to select ELIC as the annuity provider. "It is the board duly convened and acting *as a unit* that is made representative of the company," not "[t]he assent or determination of the members of the board acting separately and individually . . . ." 2 *Fletcher*, *supra*, § 392 (emphasis added). Hence, the casting of votes by defendants Hurwitz and Leone (along with a third director who, notwithstanding his equivalent voting role, was dismissed as a defendant) to select ELIC as the annuity provider, did not mystically transform each individual director into an ERISA fiduciary. Rather, the fiduciary remained, and remains, Pacific Lumber, the named fiduciary. On these facts, under *Confer* or indeed any analysis that respects rather than revises ERISA, none of the individual defendants, MGI nor MAXXAM would be considered an ERISA fiduciary.

Unlike the *Confer* court, the Ninth Circuit refused to recognize the elementary principles of corporate governance and ERISA interpretation discussed above. Instead, the Ninth Circuit held that, as a matter of law, a corporate named fiduciary's officers and directors personally exercise fiduciary management and control when acting on behalf of the corporation. In so holding, the Ninth Circuit both ignored the functional test of section 3(21) and nullified section 402 as it relates to corporations designated as a "named fiduciary."

The Ninth Circuit's decision not only disregards this Court's requirement of strict construction of ERISA, and contravenes the Third Circuit, but it also fails to apply the very functional test of ERISA section 3(21)(A) upon which it supposedly relied. The court said it "held corporate officers to be liable as fiduciaries on the basis of their conduct and authority with respect to ERISA plans," App. 20, but nowhere does it identify any conduct of either Mr. Hurwitz or Mr. Leone that could have made them fiduciaries "as a matter

of" fact or law. App. 24.[17] If the lower court had applied the functional test mandated by section 3(21)(A), it could have reached only one conclusion: Messrs. Hurwitz' and Leone's status as directors of Pacific Lumber was woefully insufficient upon which to base a conclusion that their actions were individual exercises of "discretionary authority or control" over the Plan within the meaning of ERISA.

Moreover, the Ninth Circuit surely would have recognized that, as advisors to the board of directors who did not cast votes at the October 1986 meeting, defendants Iaco and Schwartz did not exercise any discretionary authority or control over the selection of ELIC and therefore could not be ERISA fiduciaries. Finally, if it had applied the test of section 3(21)(A) with the law of corporate governance in mind, the Ninth Circuit surely would also have realized that neither MAXXAM nor MGI had any control over the selection of ELIC because the power to make that decision was vested solely in Pacific Lumber's board of directors, acting as a unit. Hence, neither MAXXAM nor MGI could be ERISA fiduciaries.

The Ninth Circuit's expansion of fiduciary status to all officers and directors of the corporation, without a shred of proof that any of them acted in any capacity other than exercising corporate responsibilities as directors or officers, will create endless mischief unless overturned now. The court has created new vistas of liability, unknown in extent or application, in direct contravention of this Court's requirements that liability is not to be expanded beyond the precise terms of ERISA. That extension of liability creates strong disincentives for corporations to continue to offer ERISA benefit plans or to initiate new ones. The decision will also make it much harder than it already is to induce qualified

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[17]The record was plainly inadequate upon which to base the decision that Messrs. Hurwitz and Leone were fiduciaries as a matter of law. The record would unquestionably have been fully developed if the district court had not cut the proceedings short by properly applying the then-existing law that plaintiffs had no standing to maintain the action at all.

persons to serve as officers or directors of corporations that have benefit plans subject to ERISA.

CONCLUSION

The questions presented herein are ripe for this Court's determination. Petitioners pray that this Court will grant *certiorari* in this case.

Dated: August 4, 1995.

Respectfully submitted,

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Admitted to the Bar of
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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARENCE KAYES; GENE KENNEDY; SHARON KENNEDY; WILEY LACY; JOHN R. MAURER; LESTER REYNOLDS; SHIRLEY REYNOLDS; HOLLIS ROLLINS; DONALD FILBY; JACK MILLER; JAMES LOVELL; PAUL S. BRADY; WILFRED A. BLAIN; LLOYD S. TUCKER,
Plaintiffs-Appellees,

v.

PACIFIC LUMBER COMPANY; MAXXAM GROUP, INC.; MAXXAM, INC.; CHARLES HURWITZ; PAUL N. SCHWARTZ; JAMES IACO; WILLIAM LEONE,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of California
Saundra B. Armstrong, District Judge, Presiding

Argued and Submitted
May 10, 1994 — San Francisco, California

No. 93-16575
D.C. No.
CV-89-03500-SBA

Filed April 10, 1995

Before: Herbert Y.C. Choy, Cecil F. Poole,
and Stephen Reinhardt, Circuit Judges.
Opinion by Judge Choy

SUMMARY

Labor and Employment/ERISA/
Litigation and Procedure (Civil)

The court of appeals affirmed in part a district court judgment and reversed in part. The court held that former participants or beneficiaries of a terminated pension plan have standing to seek relief, where an alleged fiduciary breach has occurred involving the purchase of insurance contracts or annuities in connection with their termination as plan participants.

Appellants, former employees or eligible spouses of former employees of appellee Pacific Lumber Co. (PLC) or of its subsidiaries, brought an action under the Employee Retirement Income Security Act (ERISA) on behalf of beneficiaries and participants of the PLC Pension Plan. The plaintiffs sued PLC and appellees Maxxam Group, Inc. (MGI), Maxxam, Inc. (Maxxam), Charles Hurwitz, Paul Schwartz, James Iaco and William Leone. Hurwitz is principal owner of Maxxam, which owns MGI, which in turn owns PLC. Leone is the former President and CEO of PLC, and former director of Maxxam and MGI. Schwartz and Iaco are present or former executives of Maxxam or MGI.

The action was filed in response to the termination of the PLC Pension Plan and the subsequent purchase by PLC of a group annuity contract from Executive Life Insurance Co. (ELIC). The Plan termination followed the successful hostile takeover of PLC by MGI. The takeover was financed by "junk" bonds, some of which were purchased by ELIC. Pursuant to the Plan's terms, the Plan's fiduciaries chose to pay lump sums to certain Plan participants. For the rest of the participants and beneficiaries, PLC initiated a bidding procedure to obtain a group annuity contract to pay vested retirement benefits. ELIC was selected to provide the group annuity. In accepting ELIC's bid, $62 million in "surplus" Plan assets were captured by the defendants pursuant to the Plan's terms.

The plaintiffs contended that the transactions were in violation of the fiduciary duties of ERISA and constituted prohibited transactions under ERISA. The Secretary of Labor filed an action against the same defendants alleging violations of ERISA based on the purchase and selection of an annuity. The two actions were treated as related cases.

The defendants moved for summary judgment on the grounds that ERISA's fiduciary duty provisions are inapplicable to the selection of an annuity provider, and that the McCarran-Ferguson Act precluded relief. The district court rejected both assertions. The court also denied the plaintiffs' request for class certification, finding that the action instead had to be maintained as a derivative suit pursuant to Fed. R. Civ. P. 23.1. The court also dismissed certain named plaintiffs as inadequate representatives. The court granted the defendants' motion for summary judgment on the two prohibited transactions claims. The court further held that PLC, Hurwitz and Leone were fiduciaries as a matter of law, and that summary judgment as to the fiduciary status of the other defendants could not be determined as a matter of law due to unresolved issues of fact. The court also held that the plaintiffs were no longer participants or beneficiaries under ERISA because the group annuity purchase provided them with an irrevocable commitment to payment of all vested benefits. Thus, the court held that the plaintiffs lacked standing to sue for any breach of fiduciary duty in the choice of the group annuity. The court also denied the plaintiffs' motions for interim attorney's fees. The plaintiffs appealed and PLC cross-appealed.

[1] The Pension Annuitants Protection Act of 1994 amends ERISA to clarify that former participants or beneficiaries of terminated pension plans have standing to seek relief where, as in this case, a fiduciary breach has occurred involving the purchase of insurance contracts or annuities in connection with their termination as plan participants. **[2]** Accordingly, under ERISA, the plaintiffs had standing to sue for "appropriate relief." The dismissal of the plaintiffs' suit was, therefore, reversed.

[3] The McCarran-Ferguson Act states that an act of Congress shall not be construed to invalidate, impair or supersede any state law enacted for the purpose of regulating the "business of insurance," unless the act of Congress "specifically relates to the business of insurance." [4] The Supreme Court has stated that both in general and in particular, ERISA relates to the business of insurance. In addition, although it is true that the Ninth Circuit has held, and the Court has implied, that the effect of ERISA's saving clause was to preserve the McCarran-Ferguson Act's reservation of insurance regulation to the state, the Court has rejected the argument that the saving clause always prevents application of ERISA. [5] The logical reading of the statutes and a relevant Court opinion is that ERISA is not subject to the McCarran-Ferguson Act because ERISA relates to insurance. ERISA's saving clause does not prevent the application of ERISA's fiduciary standards in areas governed by state insurance laws. Thus, the district court was correct in finding that the McCarran-Ferguson Act did not bar the plaintiffs' claims.

[6] The preamble to the district court's order revealed that the district court ruled on the fiduciary status issue in both cases. [7] Therefore, the issue of fiduciary status was properly before the court of appeals.

[8] The Plan at issue in this case named the corporation PLC as the Plan fiduciary. [9] The Ninth Circuit has held corporate officers to be liable as fiduciaries on the basis of their conduct and authority with respect to ERISA plans. [10] Any interpretation of the Plan which prevented individuals acting in a fiduciary capacity from being found liable as fiduciaries was void. [11] Although the Third Circuit found in another case that an officer who acts on behalf of a named fiduciary corporation cannot be a fiduciary if he acts within his official capacity and if no fiduciary duties are delegated to him individually, the Third Circuit's interpretation was rejected. The broadly based liability policy underpinning ERISA and its functional definition of "fiduciary" compelled the conclusion that the district court correctly found that Hurwitz and Leone were fiduciaries as a matter of law. [12] In addition, the

district court did not err in finding that a genuine issue of fact existed regarding Maxxam, MGI and other individuals' fiduciary status.

[13] The district court erred in holding that an ERISA action must be brought under Rule 23.1 and, therefore, erroneously concluded that this suit could not be maintained as a class action. **[14]** Although this suit could [sic] be characterized as "derivative" in the broad sense, it clearly did not fall within the terms of Rule 23.1. The Rule applies only to derivative actions brought by one or more *shareholders* or *members* to enforce a *corporation's* or *unincorporated association's* right. In this case, the plaintiffs were suing as plan beneficiaries to enforce the right of the Plan against its fiduciaries. **[15]** Not every "derivative" action falls under Rule 23.1. **[16]** Neither the text of Rule 23.1 nor the concerns that motivate its separate treatment for shareholder derivative actions applied in this case, for the plaintiffs were not "shareholders" suing on behalf of a "corporation." **[17]** In addition, the district court erred in concluding that the class representatives' claims were not "typical." **[18]** Furthermore, while certain other lawsuits revealed some animosity towards the directors of PLC for allowing the takeover, or towards Maxxam for taking over PLC, they hardly constituted evidence of vindictiveness to such an extent that certain plaintiffs could not adequately represent the class. **[19]** By giving undue weight to litigation which was neither pending, nor tending to show unusual animus towards the defendants other than a desire to protect named plaintiffs' rights, the district court may have abused its discretion; **[20]** remand on this issue was warranted.

[21] The plaintiffs asserted that the defendants' purchase of annuities from ELIC constituted a prohibited transaction because the defendants selected ELIC in order to maximize their recovery of surplus plan assets, and therefore, constituted a transfer for the benefit of a party in interest or self-dealing. **[22]** However, the Ninth Circuit rejected this same argument in a previous case. **[23]** The plaintiffs also alleged that PLC engaged in a prohibited transaction in obtaining a bridge

loan to finance MGI's takeover of PLC; in obtaining the loan, PLC pledged as collateral the right to receive the future residual distributions from the Plan after the Plan's termination, the purchase of annuities, and other required distributions. **[24]** Although the Plan assets were never at risk by being indirectly put up as collateral, **[25]** the collateral for the bridge loan was a plan asset. Thus, the district court's dismissal of this prohibited transaction claim was reversed.

[26] Interim attorney's fees are available under ERISA to the extent that they are available under civil rights statutes. Thus, the district court was reversed on the fee issue and remand was ordered.

COUNSEL

Alfred H. Sigman, Sigman, Lewis & Feinberg, Oakland, California, for the plaintiffs-appellants-cross-appellees.

Kathleen V. Fisher and James F. McCabe, Morrison & Foerster, San Francisco, California, for the defendants-appellees-cross-appellants.

Timothy Hauser, United States Department of Labor, Washington, D.C., for the amicus Secretary of Labor.

Warren Gorlick, American Association of Retired Persons, Washington, D.C., for the amicus American Association of Retired Persons.

OPINION

CHOY, Circuit Judge:

I. FACTUAL AND PROCEDURAL BACKGROUND

This appeal arises out of an action brought by Plaintiffs under the Employee Retirement Income and Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., on behalf of beneficiaries and participants of the Pacific Lumber Company Pension Plan ("the Plan"). Plaintiffs are former employees, or eligible spouses of former employees of Pacific Lumber Com-

pany ("PLC") or of its subsidiaries. Defendant Charles Hurwitz is principal owner of Maxxam, Inc. ("Maxxam"), which owns Maxxam Group Inc. ("MGI"), which in turn owns PLC. Maxxam and MGI are also defendants. Defendant William Leone is the former President and CEO of PLC, and former director of Maxxam and MGI. Defendants Schwartz and Iaco are present or former executives of Maxxam or MGI.[1]

This action was filed in response to the termination in 1986 of the Plan, and the subsequent purchase by PLC of a group annuity contract from Executive Life Insurance Company ("ELIC"). The Plan termination followed the successful hostile takeover of PLC by MGI in the fall of 1985. The takeover was financed by $450 million in "junk" bonds, nearly $100 million of which were purchased by ELIC.

Effective March 31, 1986, PLC terminated the Plan. Pursuant to the Plan's terms, the Plan's fiduciaries chose to pay lump sums to Plan participants with less than $3,500 in vested benefits. For the rest of the participants and beneficiaries, PLC initiated a bidding procedure to obtain a group annuity contract to pay vested retirement benefits. ELIC was added to the list of potential bidders at Hurwitz's insistence. On October 1, 1986, despite negative evaluations (the details of which are relevant to the underlying lawsuit, but not to the outcome of this appeal), ELIC was selected to provide the group annuity. ELIC's bid was the lowest offered, $2.7 million lower than the next lowest bid. In accepting this bid, $62 million in "surplus" Plan assets were captured by defendants pursuant to the terms of the Plan.

Plaintiffs filed this suit on September 25, 1989, contending that the above transactions were in violation of the fiduciary

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[1] For the purposes of this opinion, all the plaintiffs are collectively referred to as "Plaintiffs," unless referred to individually; the defendants are referred to as "PLC" or "Defendants," unless referred to individually. Arguments put forth in the Defendants' briefs are attributed to "PLC," even though PLC is only one defendant. The Secretary of Labor is referred to as "the Secretary," or "the Secretary of Labor."

duties of ERISA § 404, 29 U.S.C. § 1104, and constituted prohibited transactions under ERISA § 406, 29 U.S.C. § 1106.

ELIC was taken over by the State of California on April 11, 1991, due to its precarious financial condition. Payments were suspended for a short time, and resumed at 70% in May. Subsequently, a Stipulated Order was entered on August 14, 1991, under which PLC agreed to make up retroactively and progressively any shortfall in payments due from ELIC, provide Plaintiffs' counsel with 45 days notice prior to termination of such payments, and notify all Plan participants of pendency of the litigation and of the terms of the agreement.[2] The California conservatorship concluded with the transferring of all of ELIC's "restructured" liabilities to a newly formed Aurora Life Assurance Co. Aurora's financial stability is undetermined at this point.

On June 12, 1991, the Secretary of Labor filed an action against the same defendants alleging violations of ERISA §§ 404 & 403, 29 U.S.C. §§ 1104 & 1103, based on the purchase and selection of an annuity. *Reich v. Pacific Lumber Co.*, No. C-91-1812-SBA (N.D. Cal. filed June 12, 1991). The two actions were not formally consolidated, but were treated as related cases and proceeded concurrently pursuant to the same pretrial order.

On March 8, 1993, Defendants moved for summary judgment on the grounds that ERISA's fiduciary duty provisions are inapplicable to the selection of an annuity provider, and that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, precludes relief. The district court rejected both these assertions. PLC has filed a cross-appeal solely as to the holding regarding the McCarran-Ferguson Act.

On April 14, 1993, the district court denied Plaintiffs' request for class certification, finding that the action instead

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[2]There is some dispute as to whether the above concessions were made voluntarily or under threat of litigation. However, the voluntariness of the concessions is irrelevant to this appeal.

had to be maintained as a derivative suit pursuant to Fed. R. Civ. P. 23.1, and ordered Plaintiffs to file an amended complaint. The district court also dismissed certain named plaintiffs as inadequate representatives, and ordered Plaintiffs' counsel to withdraw from representing certain persons and entities with whom it found potential for conflicts of interest. Plaintiffs appeal this order in its entirety.

On May 11, 1993, Defendants moved for summary judgment on the two § 406 prohibited transactions claims. This motion was granted. Plaintiffs appeal this judgment.

On May 17, 1993, the district court held that PLC, Hurwitz, and Leone were fiduciaries as a matter of law, and that summary judgment as to the fiduciary status of the other defendants could not be determined as a matter of law due to unresolved issues of fact. PLC cross-appeals this order. In the same order, the district court held that Plaintiffs were no longer participants or beneficiaries under ERISA because the group annuity purchase provided them with an irrevocable commitment to payment of all vested benefits. Therefore, the district court held that they lacked standing to sue for any breach of fiduciary duty in the choice of the group annuity. On July 17, 1993, this holding was affirmed on reconsideration. Plaintiffs appeal this order.

Plaintiffs made two motions for interim attorneys fees, on June 13, 1992 and on July 26, 1993. Both were denied on the basis that they were premature; the second was also denied for lack of standing. Plaintiffs appeal this holding.

II. DISCUSSION

A. Plaintiffs' Standing

The district court held that Plaintiffs lacked standing to sue within the meaning of 29 U.S.C. § 1132(a)(2) as they were no longer "participants" of a pension plan because the Plan had terminated prior to their commencing this action. Standing is a question of law which we review de novo. *Ellis v. City*

of La Mesa, 990 F.2d 1518, 1523 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2707 (1994).

ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), provides: "A civil action may be brought — (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title." A participant is defined as "any employee or former employee of an employer or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan." ERISA § 3(7), 29 U.S.C. § 1002(7). The district court followed this court's reasoning in *Kuntz v. Reese*, 785 F.2d 1410 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 916 (1986), which held that former pension plan participants and beneficiaries who had received all of the vested benefits owed to them under the plan no longer had standing to sue on behalf of the terminated plan. The *Kuntz* court reasoned:

> Kuntz plaintiffs are not participants because, as former employees whose vested benefits under the plan have already been distributed in a lump sum, the Kuntz plaintiffs were not "eligible to receive a benefit," and were not likely to become eligible to receive a benefit, at the time that they filed the suit. Because, if successful, the plaintiffs' claim would result in a damage award, not in an increase of vested benefits, they are not plan participants .... any recoverable damages would not be benefits from the plan.

Id. at 1411. The district court declined to apply an exception to the Kuntz holding created in *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406, 1408 (9th Cir. 1988), which permitted former plan participants to pursue the equitable remedy of a constructive trust imposed on the plan fiduciary's ill-gotten profits.

[1] Congress has since directly addressed the ability of former pension plan participants and beneficiaries to bring suit under ERISA. The Pension Annuitants Protection Act of 1994 ("PAPA"), Pub. L. No. 103-401 (Oct. 22, 1994), amends ERISA § 502(a), 29 U.S.C. § 1132(a), to clarify that

former participants or beneficiaries of terminated pension plans have standing to seek relief where, as here, a fiduciary breach has occurred involving the purchase of insurance contracts or annuities in connection with their termination as plan participants.[3] Section 2 of PAPA, 29 U.S.C. § 1132(a)(9), provides:

> [(a) A Civil action may be brought . . .]
>
> (9) in the event that the purchase of an insurance contract or insurance annuity in connection with the termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, *by any individual who was a participant or beneficiary at the time of the alleged violation*, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

(emphasis added). PAPA represents, in part, a negative response to the district court's ruling in this case. As Representative Williams asserted:

> S. 1312 does not represent a change from current law, but rather a clarification made necessary because of recent court decisions. The courts have wrongly held that annuitants are not plan participants and therefore lack standing under ERISA to challenge the decision of the plan fiduciary

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[3]PAPA clearly applies to this case as it states that "[t]he amendments made by this Act shall apply to any legal proceeding pending, or brought, on or after May 31, 1993." PAPA § 5. Because we conclude that PAPA controls our analysis of Plaintiffs' standing, we do not need to consider whether the district court erred in declining to apply the exception to *Kuntz* set forth in *Amalgamated Clothing*.

> to dispose of plan assets by purchasing annuities . . . S. 1312 is designed to overturn this line of specific court cases.

130 Cong. Rec. H 10621 (Oct. 3, 1994).[4]

[2] Accordingly, under ERISA § 502(a)(9), 29 U.S.C. § 1132(a)(9), Plaintiffs have standing to sue for "appropriate relief, including the purchase of a back-up annuity to remedy the breach." 139 Cong. Rec. S 9874, 9874 (July 29, 1993) (Sen. Metzenbaum). We reverse the dismissal of Plaintiffs' suit.

B. The Application of the McCarran-Ferguson Act to ERISA

[3] In its cross-appeal, PLC argues that the district court erred in holding that Plaintiffs' claims are not barred by the McCarran-Ferguson Act. They claim that the McCarran-Ferguson Act prohibits the construction of ERISA upon which Plaintiffs' suit is based. Specifically, Defendants argue that Plaintiffs' construction of ERISA violates McCarran-Ferguson because it would impose liability for selecting ELIC as an annuity provider even though ELIC is licensed and regulated by California's comprehensive insurance regulatory system. The McCarran-Ferguson Act, in relevant part, states: "No Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). The applicability of the McCarran-Ferguson Act

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[4] *See also* 139 Cong. Rec. S 9874 (July 29, 1993) (Senator Metzenbaum, one of the bill's sponsors, stating "this legislation is needed because of an unexpected decision by the U.S. Supreme Court 2 months ago"); 140 Cong. Rec. H 10621, 10622 (Oct. 3, 1994) (Secretary of Labor Robert Reich arguing that the amendment "is an important step in overcoming the problems created by Mertens and Kayes."); *id.* (statement by Representative Barrett); *id.* (statement by Representative Goodling). *See Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993); *Kayes v. Pacific Lumber Co.*, C-89-3500 SBA, C-91-1812 SBA, 1993 U.S. Dist. LEXIS 7280 (N.D. Cal. May 17, 1993).

to ERISA is a question of law, which we review de novo. *See General Motors Corp. v. California Bd. of Equalization*, 815 F.2d 1305, 1309 (9th Cir. 1987), *cert. denied*, 485 U.S. 941 (1988); *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

The McCarran-Ferguson Act, by its own terms, does not preclude a construction of a federal statute that would affect state law if the congressional act "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). Therefore, it must first be determined whether ERISA in general, or the section of ERISA relied upon by Plaintiffs in particular, "specifically relates to the business of insurance." *Id.*

In *Hewlett-Packard Co. v. Barnes*, 571 F.2d 502, 505 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978), we held that California's Knox-Keene Act was preempted by ERISA to the extent that it attempted to regulate ERISA covered employee benefit plans as part of its comprehensive health care service legislation. It was claimed that because the Knox-Keene Act is a state law regulating insurance, construing ERISA to preempt it would violate the McCarran-Ferguson Act. We rejected that argument:

> [A]ppellant's argument not only ignores those ERISA sections that undeniably "specifically relate" to the business of insurance, but also overlooks ERISA's "deemer" clause, which states that an employee benefit plan shall not be deemed to be engaged in the business of insurance for the purposes of state law. If McCarran-Ferguson applies, therefore, ERISA falls within the clause excepting federal laws that "specifically relate" to the business of insurance.

Id. at 505 (citations omitted). PLC asserts that the pronouncement in *Hewlett Packard* that ERISA falls within the "specifically relates" exception does not indicate that ERISA in its entirety relates to the business of insurance. Rather, it contends that *Hewlett-Packard* holds only that the portion of ERISA which prohibits state laws from regulating employee benefit plans by treating them as insurance companies falls within the "specifically relates" exception.

The resolution of this issue turns on whether ERISA in its entirety "specifically relates" to insurance, or whether only those sections of ERISA which explicitly deal with insurance should be deemed to "specifically relate" to insurance. We find guidance in the Supreme Court's opinion in *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517 (1993). The issue in *Harris Trust* was whether the contract was a "guaranteed benefit policy" under ERISA § 401(b)(2), 29 U.S.C. § 1101(b)(2). As a preliminary matter, the Supreme Court held that the McCarran-Ferguson Act did not preclude application of ERISA's fiduciary standards to the insured's management of assets held under the contract. "Instead, we hold, ERISA leaves room for complementary or dual federal and state regulation, and calls for federal supremacy when the two regimes cannot be harmonized or accommodated." *Id.* at 525. In rejecting the McCarranFerguson Act preclusion, the Court stated:

> But as the United States points out, "ERISA, both in general and in the guaranteed benefit policy provision in particular, obviously and specifically relates to the business of insurance." Thus, the McCarran-Ferguson Act does not surrender regulation exclusively to the States so as to preclude the application of ERISA to an insurer's actions under a general account contract.

Id. (citation omitted).

[4] PLC contends that just as in *Hewlett-Packard*, the Court's holding in *Harris Trust* is not conclusive on this issue, because the Court was primarily concerned with the scope of ERISA § 401(b)(2), 29 U.S.C. § 1101(b)(2), which specifically refers to the business of insurance.[5] There are two flaws in PLC's argument. First of all, it is refuted by the broad

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[5] 29 U.S.C. § 1101(b)(2) reads: "In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer." The statute goes on to define "insurer" and "guaranteed benefit policy."

language used by the Supreme Court. The Court states that "*both* in general and . . . in particular" ERISA relates to the business of insurance. *Id.* (emphasis added).[6] Secondly, PLC misreads the saving clause in ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A), to be evidence that the McCarran-Ferguson Act reserves the business of insurance to the states.[7] It is true that this court has held, and the Supreme Court has implied, that the effect of ERISA's saving clause was to preserve the McCarran-Ferguson Act's reservation of insurance regulation to the state. *See General Motors Corp.*, 815 F.2d at 1310; *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 744 n.21 (1985). However, in *Harris Trust* the Court rejected the argument that the saving clause always prevents application of ERISA:

> [W]e discern no basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis. State law governing insurance generally is not displaced, but "where [that] law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress," federal preemption occurs . . . . As the United States recognizes, "dual regulation under ERISA and state law is not an impossibility[;] [m]any requirements are complementary, and in the case of a direct conflict, federal supremacy principles require that state law yield."

114 S. Ct. at 526 (citations omitted).

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[6] In addition, the Court noted that it had already recognized the "deliberately expansive' character of ERISA's preemptive provisions in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46, 107 S. Ct. 1549, 1552, 95 L. Ed. 2d 39 (1987)." *Id.* at 525 n.8. In *Pilot Life*, the Court observed that the legislative history of ERISA "emphasized both the breadth and importance of the pre-emption provisions" of ERISA. 481 U.S. at 46.

[7] ERISA's saving clause, 29 U.S.C. § 1144(b)(2)(A), states: "Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any persons from any law of any State which regulates insurance, banking, or securities."

"No decision of this Court has applied the saving clause to supercede a provision of ERISA itself." *Id.* at 526 n.9. If this court were to accept PLC's argument, it would be the first decision of any court to apply the McCarran-Ferguson Act to supersede a provision of ERISA.

[5] We find that the saving clause was inserted into ERISA specifically because ERISA relates to insurance, and Congress intended to prevent ERISA from preempting state insurance laws. The logical reading of the statutes and the Court's opinion in *Harris Trust* is that ERISA is not subject to the McCarran-Ferguson Act because ERISA relates to insurance. Although the saving clause generally precludes the application of ERISA's broad preemption provision to state insurance laws, that clause does not prevent the application of ERISA's fiduciary standards in areas governed by state insurance laws.[8] Accordingly, the district court was correct in finding that the McCarran-Ferguson Act does not bar the Plaintiffs' claims.

C. Fiduciary Status of the Defendants

On cross-appeal, PLC asserts that the district court erred in ruling that, as a matter of law, defendants Hurwitz and Leone were Plan fiduciaries (thus granting the Secretary of Labor's and arguably Plaintiffs' motion for summary judgment), and that the status of defendants Schwartz, Iaco, MAXXAM and MGI could not be decided as a question of law (thus denying Plaintiffs' motion for summary judgment as well as Defendants' cross-motion for summary judgment).

1. Is the Issue Properly Before This Court?

Before addressing the merits of the district court's fiduciary status holdings, we must determine whether we have jurisdiction to consider the issue. The question of jurisdiction arises

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[8] ERISA's legislative history also indicates that the McCarran-Ferguson Act does not preempt ERISA's fiduciary standards because ERISA relates to insurance. *See* S. Rep. No. 127, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871 & 4883.

because the district court addressed the summary judgment motion of the Plaintiffs in this action as well as that of the Secretary of Labor in the related action, *Reich v. Pacific Lumber*, No. C-91-1812-SBA (N.D. Cal. filed June 12, 1991). The current case and the Secretary's action were treated as related cases, and the two cases proceeded concurrently pursuant to the same pretrial order. On May 11, 1993, the district court heard arguments regarding motions in both actions concerning the fiduciary status of Defendants. However, at the same time, it heard arguments regarding Plaintiffs' standing as "participants" as discussed above. In an order filed on May 17, 1993, the district court held that defendants Hurwitz and Leone were plan fiduciaries and granted summary judgment on this point, but as to the other defendants, summary judgment was denied. At the same time, the district court held that Plaintiffs lacked standing.

Because only Plaintiffs' action is being appealed at this time (the Secretary's action having been stayed pending the outcome of this appeal), it is asserted that the district court did not rule on the fiduciary status of Defendants in the case at bar, but only made the ruling as to the Secretary's action. PLC takes the position that the district court divested itself of jurisdiction over Plaintiffs' action when it ruled that Plaintiffs lacked standing, and so only ruled on the fiduciary duty question in the Secretary's suit.

In the preamble to the district court's May 17 order, the court summarized that at the hearing on May 11, 1993:

> For the reasons stated at oral argument, the court . . . granted plaintiffs' cross-motions for summary adjudication in both cases regarding the fiduciary status of defendants Charles Hurwitz and William Leone; denied the plaintiffs' cross motion and the defendants' motion for summary adjudication in both cases regarding the fiduciary status of defendants Maxxam, Inc., Maxxam Group, Inc., Paul Schwartz and James Iaco.
>
> Defendants' motion for summary judgment for lack of standing in the *Kayes* case was taken under submission.

Kayes v. Pacific Lumber Co., Nos. C-89-3500 SBA, C-91-1812 SBA, 1993 U.S. Dist. LEXIS 7280, at *1-2 (May 17, 1993). In the body of the Order, the district court held that Plaintiffs lacked standing and dismissed their action. At the conclusion of this Order, the court stated "IT IS HEREBY ORDERED THAT . . . (2) The Secretary's motion for summary adjudication of the fiduciary status issue is GRANTED with respect to defendants Pacific Lumber, Charles Hurwitz, and William Leone. With respect to other defendants, the motion and cross-motion for summary adjudication of the fiduciary status is DENIED." *Id.* at *6-7.

[6] The preamble to the order reveals that the court ruled on the fiduciary status issue in both cases. The court's statement in the written Order, holding that the Secretary's motion is granted in part and denied in part, reflects the fact that the court determined that Plaintiffs lacked standing and therefore dismissed their case. Once it found that Plaintiffs lacked standing, the district court no longer had jurisdiction over their claims and so only had to rule on the Secretary's motion at the conclusion of the Order.

[7] We find that the issue of fiduciary status is properly before this court. The district court ruled orally on the issue as it related to both parties. The fact that it later found that Plaintiffs lacked standing does not change the finality of that order.

2. Fiduciary Status of Hurwitz and Leone as a Matter of Law

PLC argues that the district court erred in finding that, as a matter of law, Hurwitz and Leone were fiduciaries of the Plan. This court reviews the grant of summary judgment de novo, viewing all evidence in the light most favorable to PLC, the nonmoving party. *See Wang Laboratories, Inc. v. Kagan*, 990 F.2d 1126, 1128 (9th Cir. 1993). The facts are not in question here; it is purely a question of law that we must determine.

PLC asserts that Hurwitz and Leone were not fiduciaries because they acted solely on behalf of PLC, who was the named fiduciary in the Plan. Under ERISA § 402(a)(1),

29 U.S.C. § 1102(a)(1), every plan must have a named fiduciary with authority to administer the plan. ERISA permits corporations to be fiduciaries. *See* ERISA § 3(9), 29 U.S.C. § 1002(9) (definition of "person" includes corporation, and ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) defines fiduciary in terms of a "person"); *Confer v. Custom Eng'g Co.*, 952 F.2d 34, 36 (3d Cir. 1991).

[8] The Plan at issue named the corporation PLC as the Plan fiduciary. Pacific Lumber Company Retirement Plan, § 11(b). It further went on to provide that the Company could delegate fiduciary responsibilities, but that "[t]he Company's duties and responsibilities under the Plan not delegated to other fiduciaries . . . shall be carried out by the Company's directors, officers and employees, acting on behalf of and in the name of the Company . . . and not as individual fiduciaries." *Id.*, § 11(e).

PLC's proferred ground for error rests on the contention that where a corporation is the named fiduciary, the persons who act on behalf of the corporation do not become individual fiduciaries by virtue of those acts, even under the functional definition of fiduciary set forth in ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). PLC's argument lacks merit.

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), provides a functional definition of a fiduciary which depends, in part, upon whether a person "exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . ." The Supreme Court has held that ERISA "defines 'fiduciary' not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan, thus expanding the universe of persons subject to fiduciary duties — and to damages — under § 409(a)." *Mertens v. Hewlett Assocs.*, 113 S. Ct. 2063, 2071 (1993) (citation omitted).

PLC does not claim that under this functional test Hurwitz and Leone are not fiduciaries. Instead, citing *Confer*, it asserts that because PLC acted solely on behalf of the corporation,

only the corporation is a fiduciary, not its officers. In *Confer*, the Third Circuit held that "when an ERISA plan names a corporation as a fiduciary, the officers who exercise discretion on behalf of that corporation are not fiduciaries within the meaning of section 3(21)(A)(iii), unless it can be shown that these officers have *individual* discretionary roles as to plan administration." 952 F.2d at 37. The gist of the Third Circuit's holding is that where a corporation is designated as the plan fiduciary, an officer's actions will not render that officer a fiduciary where those actions are ones with which the designated named fiduciary is chargeable. In other words, when the named fiduciary does not designate the officer, either explicitly or impliedly, as a fiduciary, the officer is shielded from personally becoming a fiduciary, *id.*, so long as he acts within the corporate form. *See id.* at 38 n.4.

[9] Insofar as *Confer* holds that a corporate officer or director acting on behalf of a corporation is not acting in a fiduciary capacity if the corporation is the named plan fiduciary, we disagree with the Third Circuit's conclusion. The *Confer* holding is undermined by the decision of this court in *Yeseta v. Baima*, 837 F.2d 380 (9th Cir. 1988), the text of ERISA, and the agency interpretations of ERISA. This court has held corporate officers to be liable as fiduciaries on the basis of their conduct and authority with respect to ERISA plans. In *Yeseta* we held that by withdrawing funds from plan assets a corporate officer of a plan sponsor was a fiduciary, whether or not the sponsoring corporation authorized him to make such withdrawals:

> Under § 1002(21), a fiduciary includes a person who "exercises any authority or control respecting management or disposition of [a plan's] assets." Whether Yeseta was authorized to make the $14,200 and the $25,000 withdrawals or not, he did exercise control over and disposed of Plan assets.... On this basis, Yeseta is a fiduciary under § 1002(21) whether or not he individually, or the business as an entity, incurred a benefit from the withdrawal.

Id. at 386. It was irrelevant for the purpose of § 1002(21) whether Yeseta was acting on behalf of the corporation or

outside of his authority. Either way, if he met the functional definition of § 1002(21), Yeseta was a fiduciary. Thus, *Yeseta* rejected the distinction relied upon in *Confer*, 952 F.2d at 37, between officers exercising discretion "on behalf of a corporation" and officers "hav[ing] individual discretionary roles."

PLC claims that *Yeseta* is distinguishable from both this case and *Confer*, because unlike the situation in *Confer*, where the corporation was named as the plan fiduciary, in *Yeseta* the corporate employer was not a named fiduciary. Rather, in *Yeseta*, two of the corporate employees were named fiduciaries. Therefore, the argument runs, Yeseta could not claim to have been exercising the fiduciary duty of the corporation, since the corporation was not a named fiduciary. PLC points out that *Confer* is the only case entirely on point in any federal circuit court. No other cases present the analogous situation in which a corporation is the named fiduciary, but the person acting on behalf of the corporation is charged with being a fiduciary.

Even if *Yeseta* were distinguishable on the ground suggested by PLC, the language of ERISA itself undermines the Third Circuit's holding and PLC's contentions. ERISA specifically provides for personal, as well as corporate, liability. 29 U.S.C. § 1109(a) provides that "[a]ny person who is a fiduciary . . . who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable . . . ." However, "fiduciary" and "named fiduciary" have separate definitions for purposes of the subchapter containing § 1109. The term "fiduciary" is defined "[f]or purposes of this subchapter" at 29 U.S.C. § 1002(21)(A), and it is a functional definition as noted above. In contrast, "named fiduciary" is given a separate and formal definition in 29 U.S.C. § 1102(a)(2):

> For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by

> such an employer and such an employee organization acting jointly.

There is no indication that an officer of a named fiduciary cannot be a fiduciary and the personal liability provision asserts that all fiduciaries will be held personally liable, without mention of named fiduciaries. 29 U.S.C. § 1109.

[10] Moreover, 29 U.S.C. § 1110 states that "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." The section goes on to allow insurance of fiduciaries for potential liability, but not to permit relief from liability. *See* 29 C.F.R. § 2509.75-4 (1993) (interpreting the statute in the above manner). Here, PLC relies upon a statement in the Plan itself to establish that the officers of PLC are not acting as fiduciaries, but are acting on behalf of the corporation. Because that statement purports to relieve the officers from fiduciary responsibility or liability, under § 1110 it is void as against public policy. Application of § 1110 requires one to find first that the person in question is a fiduciary. However, the definition of who is a fiduciary under § 1110 is based on the person's functions, not the title conferred by the Plan. If the Plan itself could not define who was or was not a fiduciary, the § 1110 prohibition against relieving fiduciaries from liability would be rendered wholly ineffective. Therefore, we hold that any interpretation of the Plan which prevents individuals acting in a fiduciary capacity from being found liable as fiduciaries is void.

Agency interpretations of ERISA indicate fiduciary status depends on an individual's functional role rather than title. In an ERISA bulletin answering questions, fiduciary status is consistently defined by reference to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A):

> D-3 Q: Does a person automatically become a fiduciary with respect to a plan by reason of holding certain positions in the administration of such plans?

> A: Some offices or positions of an employee benefit plan by their very nature require persons who hold them to perform one or more of the functions described in section 3(21)(A) of the Act.... Persons who hold such positions will therefore be fiduciaries.
>
> Other offices and positions should be examined to determine whether they involve the performance of any of the functions described in section 3(21)(A) of the Act.

29 C.F.R. § 2509.75-8 (1993) (Department of Labor). *See also id.*, Question D-4 (regarding members of an employer fiduciary's board of directors); *id.*, Question FR-16 (regarding a fiduciary who is not a named fiduciary). The agency interpretations favor finding fiduciary status for discretionary actions and creating personal liability for breach of the fiduciary duties to which those actions necessarily give rise.

[11] Accordingly, we reject the Third Circuit's interpretation in Confer that an officer who acts on behalf of a named fiduciary corporation cannot be a fiduciary if he acts within his official capacity and if no fiduciary duties are delegated to him individually. The broadly based liability policy underpinning ERISA and its functional definition of "fiduciary" compel the conclusion that the district court correctly found that Hurwitz and Leone were fiduciaries as a matter of law. As one court noted:

> The legislative history is replete with indications of congressional concern to assure adequate protection for the interests of plan participants and beneficiaries beyond that available under conventional trust law. Applying a restrictive judicial gloss to the term "fiduciary" itself would, in effect, enable trustees to transfer important responsibilities to a largely immunized "administrative" entity.

Eaton v. D'Amato, 581 F.Supp. 743, 746 (D.D.C. 1980) (citations omitted). Were we to accept PLC's argument, a corporation would be able to shield its decision-makers from personal liability merely by stating in the plan documents that all their actions are taken on behalf of the company and not in a fiduciary capacity. We find that this was not Congress's

intent when it included the "named fiduciary" provision of 29 U.S.C. § 1102(a)(1). We therefore affirm the district court on this point.

3. Maxxam, MGI and other individuals' fiduciary status

[12] PLC also contends that the district court erred in failing to find that as a matter of law, MAXXAM, MGI, Schwartz and Iaco were not fiduciaries.[9] PLC claims that there has been no showing of direct fiduciary responsibility. This claim lacks merit. Viewed in the light most favorable to the nonmoving party, the district court did not err in finding that a genuine issue of fact exists. While PLC is correct that fiduciary status rests on an objective evaluation of functions performed, and not on an individual's state of mind, such an objective evaluation will be based on questions of fact regarding discretionary duty and control that must be determined at trial.

D. Class Action Certification

1. Class Action or Derivative Suit

Plaintiffs allege that the district court erred in denying their motion for class certification. The district court found that Plaintiffs had alleged only a derivative cause of action and held that under Fed.R. Civ.P. 23 a derivative suit cannot proceed as a class action because the class representatives' claims were not typical of the class claims. The district court reasoned that under *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), "the beneficiaries in the present case do not have a direct claim. Thus, it is impossible for the present plaintiff's [sic] claims to be typical of the claims of

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[9] PLC is somewhat unclear as to under what theory the district court should have found Schwartz and Iaco to be fiduciaries. However, it is evident from the district court's opinion that it considered them together with MAXXAM and MGI. In addition, because Schwartz and Iaco were not officers, employees or directors of PLC, they could not be found not to have been fiduciaries under the *Confer* theory elaborated above.

the class, because they do not have a claim, rather they bring suit on behalf of the plan's claim." *Kayes v. Pacific Lumber Co.*, C-89-3500 SBA, C-91-1812 SBA (N.D. Cal. filed April 14, 1993) ("Class Certification Order") at 5. Therefore, the district court held that Plaintiffs' suit had to be brought under Fed. R. Civ. P. 23.1 and ordered Plaintiffs to file a third amended complaint.

[13] Whether or not an ERISA claim may be brought as a class action is a question of first impression in this circuit. This is a question of law which we review de novo. *See generally*, *United States v. Yacoubian*, 24 F.3d 1, 3 (9th Cir. 1994). We find that the district court erred in holding that an ERISA action must be brought under Rule 23.1 and therefore erroneously concluded that this suit could not be maintained as a class action.

The district court based its holding that an ERISA suit is derivative in nature on the Supreme Court's holding in *Russell* and on this court's interpretation of *Russell* in *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986). In *Russell*, the Court held that while ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), authorizes a beneficiary to bring an action against a fiduciary under § 409 of ERISA, 29 U.S.C. § 1109, the recovery available under § 502(a)(2) inures to the benefit of the plan as a whole: "A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary." 473 U.S. at 142. The Court held that extra-contractual compensatory or punitive damages based on emotional distress were not available for a breach of fiduciary duty under ERISA due to a delay in processing an individual's benefit claim.

Although the Supreme Court's holding in *Russell* was limited to § 409 of ERISA regarding fiduciaries' personal liability, this court has extended it to embrace § 502(a)(3), 29 U.S.C. § 1132(a)(3), which empowers certain parties to bring an ERISA action. *Sokol*, 803 F.2d at 535-36. In concluding that extra-contractual emotional distress damages

were not available to a beneficiary under § 502(a)(3) of ERISA, this court expanded the *Russell* rationale that ERISA protections run to the plan, not to the beneficiaries: "ERISA grants no private right of action by a beneficiary *qua* beneficiary; rather, it accords beneficiaries the right to sue on behalf of the entire plan if a fiduciary breaches the plan's terms." *Id.* at 536.

This rationale was followed in *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412 (9th Cir. 1991), which held that beneficiaries could not maintain an ERISA breach of fiduciary duty claim because they sought a remedy on behalf of themselves rather than on behalf of the ERISA plan. "Under *Russell* and *Sokol*, the plaintiffs fail to present a fiduciary breach claim if the only remedy sought is for their own benefit, rather than for the benefit of the Plan as a whole." *Horan*, 947 F.2d at 1418.

Sokol and *Horan* reveal that this court has interpreted the Supreme Court's *Russell* opinion to prevent any suit under ERISA for extracontractual damages and to require that an ERISA suit cannot be maintained unless the remedy sought inures to the benefit of the plan. On this basis, the district court concluded:

> The logical result of reconciling *Russell* with the plain language of Section 1132(a)(2) is that a participant or beneficiary who brings suit for breach of fiduciary duty, does so on behalf of the plan and not in his individual capacity. While the individual has standing to bring suit, and stands to gain if the suit is successful, his benefit is secondary or derivative of the plan's gain.

Class Certification Order at 4-5.

[14] In so concluding, the district court erred in its determination that this action is a "derivative" one which must be brought under Fed. R. Civ. P. 23.1. Although this suit may be characterized as "derivative" in the broad sense, it clearly does not fall within the terms of Rule 23.1. That rule applies only to derivative actions "brought by one or more *shareholders* or

members to enforce a right of a *corporation* or of an *unincorporated association.*" (emphasis added). Plaintiffs here are not suing as "shareholders" or "members" to enforce the right of any "corporation" or "unincorporated association." Rather, they are suing as plan beneficiaries to enforce the right of the plan against its fiduciaries. When a trust beneficiary brings a derivative suit on behalf of a trust, "the specific provisions of Rule 23.1 are not controlling." Charles A. Wright, *Law of Federal Courts* § 73 at 525 (5th ed. 1994).

[15] As the Supreme Court made clear in *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 535 n.11 (1984), not every "derivative" action falls under Rule 23.1. Rule 23.1 applies only to a narrow class of derivative suits: those brought by shareholders or members of a corporation or unincorporated association to vindicate a right which may properly be asserted by that corporation or association. *See, e.g., id.* at 535 (refusing to apply Rule 23.1 where the shareholder plaintiff suing on behalf of the corporation sought to assert a right which could not properly be asserted by the corporation).

The Federal Rules of Civil Procedure single out the specific type of derivative action described in Rule 23.1 because the law has historically been particularly wary of allowing *shareholders* to sue on their *corporation's* behalf. Because of the fear that shareholder derivative suits could subvert the basic principle of management control over corporate operations, courts have generally characterized shareholder derivative suits as "a remedy of last resort." *Renfro v. FDIC*, 773 F.2d 657, 658 (5th Cir. 1985).

Moreover, the law has generally imposed an intracorporate exhaustion requirement on plaintiffs in such cases. *See, e.g., Hawes v. City of Oakland*, 104 U.S. 450, 460-61 (1881). This requirement is reflected in Rule 23.1, which directs the shareholder plaintiff to "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the

plaintiff's failure to obtain the action or for not making the effort."[10]

[16] Neither the text of Rule 23.1 nor the concerns that motivate its separate treatment for shareholder derivative actions apply here, for the plaintiffs are not "shareholders" suing on behalf of a "corporation." Accordingly, we conclude that the district court erred in requiring the plaintiffs to file an amended complaint complying with that rule.

[17] Moreover, the district court erred in concluding that the class representatives' claims were not "typical" under Fed. R. Civ. P. 23(a)(3). Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." There is no doubt that the named plaintiffs' claims are typical of the class claims. Defendants do not suggest that the named plaintiffs are subject to unique defenses or have different claims from those of any other member of the class. They rely only on the fact that Plaintiffs' common claim is a derivative one rather than a direct one. However, Rule 23(a)(3) imposes only the requirement that the class representatives' claims be typical, not that they be direct.[11] Therefore, we reverse the district court's

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[10]However, Rule 23.1 itself imposes only a *pleading* requirement. It does not create any requirement that the plaintiff actually make a demand on the board or shareholders. The question whether a demand requirement exists depends on the applicable substantive law. *See Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 97 (1991).

[11]*Lewis v. Chiles*, 719 F.2d 1044, 1048-49 (9th Cir. 1983), on which the defendants rely, is inapposite. In *Lewis*, we held that a *shareholder* could not bring a derivative action on behalf of his *corporation* as a Rule 23 class action. Our holding did *not* rest on the proposition that *any* action which can broadly be characterized at "derivative" is inappropriate for class action treatment. Rather, our decision was based on the fact that the *specific type* of "derivative" action brought by the plaintiff — a derivative action by a *shareholder* on behalf of his *corporation* — must be brought under Rule 23.1. If our reasoning was based on a broader proposition, it did not survive *Daily Income Fund.*

determination that this suit may not be maintained as a class action.

2. Dismissal of Certain Plaintiffs as Inadequate Representatives

The district court dismissed plaintiffs Kayes, G. Kennedy, Lacy, Maurer, L. Reynolds, and Schoenhofer as inadequate class representatives under Fed. R. Civ. P. 23.1 because it found them to be vindictive toward Defendants on the basis of "their long-standing, multiple grievances against the present defendants. . . ." Class Certification Order at 17.

We review the district court's determination regarding adequacy of representation for an abuse of discretion. *Harmsen v. Smith*, 693 F.2d 932, 943 (9th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983).

Vindictiveness is the eighth factor enumerated by this court in *Larson v. Dumke*, 900 F.2d 1363, 1367 (9th Cir.), *cert. denied*, 498 U.S. 1012 (1990), in its consideration of whether certain individuals were adequate class representatives. The district court based its finding that the dismissed plaintiffs were vindictive on three lawsuits filed by by Maurer, Lacy, Filby, Kayes, L. Reynolds, and Schoenhofer against Defendants, and on the fact that Maurer campaigned for a seat on the Humbolt County Board of Supervisors based on an "anti-Maxxam platform." Apparently G. Kennedy was considered vindictive because he initiated an Employee Stock Option Plan in an attempt to buy PLC from defendant Maxxam.

[18] The first lawsuit the district court relied upon, *Maurer v. Hurwitz*, Cal. Super. Ct. No. 76564, was a suit brought in state court seeking essentially the same remedy that is being sought in this case — to recover the reversion that PLC received upon the termination of the Plan. That suit was held to be preempted by ERISA, resulting in the present suit. *Maurer v. Hurwitz* shows no more vindictiveness towards Defendants than does the case at bar, but rather indicated a desire to enforce the same rights. The other two suits relied upon by the district court apparently were shareholder deriva-

tive suits regarding the leveraged buyout of PLC. While those suits reveal some animosity towards the directors of PLC for allowing the takeover, or towards Maxxam for taking over PLC, they hardly constitute evidence of vindictiveness to such an extent that these plaintiffs cannot adequately represent the class.

Although it was enumerated as a factor in *Larson*, there have been no cases in this circuit in which a plaintiff has been found to be an inadequate class representative on the basis of vindictiveness. The reason we consider vindictiveness as a factor in evaluating adequacy of representation is to render ineligible individuals who possess animus that would preclude the possibility of a suitable settlement. For instance, in *Lim v. Citizens Savings and Loan Ass'n*, 430 F. Supp. 802, 811 (N.D. Cal. 1976), the defendant argued that "plaintiff's professed 'revenge' motive creates clear potential conflicts with the class because, in this frame of mind, plaintiff is likely to by-pass favorable settlement offers." Even in such a situation, however, the court did not find the vengeful plaintiff inadequate: "Indeed, the vengeance of an aggrieved person more often engenders the zealous prosecution essential to a class action than the *over*-zealous prosecution which may threaten to strangle a class action." *Id.* at 812.

Viewed in this light, the lawsuits relied on by the district court hardly demonstrate animus that would jeopardize the interests of the class. Rather, they indicate a desire to protect share financial interests. Similarly, while it is possible that the plaintiffs might try to use the class action as leverage to obtain a settlement in such pending litigation, *see Davis v. Comed, Inc.*, 619 F.2d 588, 593-94 & 97 (6th Cir. 1980), in the case at bar none of the litigation relied upon by the district court was still pending.

[19] This court finds an abuse of discretion when it has a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors. A district court may abuse its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact."

United States v. Plainbull, 957 F.2d 724, 725 (9th Cir. 1992) (citations omitted). By giving undue weight to litigation which was neither pending, nor tending to show unusual animus towards Defendants other than a desire to protect named plaintiffs' rights, the district court may have abused its discretion. On the other hand, two other factors mentioned by the district court — the attempt to buy out PLC from Maxxam by Kayes, G. Kennedy, and L. Reynolds, and the anti-Maxxam platform by Maurer in his campaign — are factors which could properly be considered by the district court in its determination.[12]

[20] It is impossible to determine what weight the district court gave to each of these factors in its determination that the representatives were inadequate, or what standard it used in finding those representatives to be vindictive. Therefore, we remand this issue to the district court to reweigh the evidence, keeping in mind the policy behind considering vindictiveness as a factor in evaluating adequacy of representation.

3. Plaintiffs' Counsel's Potential Conflict of Interest

The district court also found that Plaintiffs' counsel possessed a potential conflict of interest because Plaintiffs' counsel also represents the PL Rescue Fund and named plaintiffs Filby and Lacy with respect to individual annuities not covered by the present suit. Therefore, the district court ruled that Plaintiffs' counsel had to eliminate these potential conflicts by withdrawing from representing the PL Rescue Fund and from representing Filby and Lacy in their individual suits.

Neither side has cited any case in opposition to or in support of the district court's ruling. Plaintiffs' claim of error seems to revolve around the one instance of a conflict cited by the district court regarding an instruction not to answer a question

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[12] In addition, it appears that plaintiffs Filby (who was not dismissed) and Lacy (who was dismissed) may have had pending lawsuits against some of the defendants regarding individual annuities not covered by the present suit. If this is true, it would support dismissal of Lacy on the basis of *Davis*.

in a deposition. Plaintiffs claim that the district court erroneously perceived this instruction as an example of a conflict; rather, they argue, the instruction not to answer was based on the attorney-client privilege. It is impossible to discover to what instance the district court was referring, as the court provided no citation to the record. Nonetheless, this argument misses the point of the district court's holding. The district court stated that, although there was no evidence that the Plan's representation had been compromised, withdrawal was necessary to eliminate *potential* conflicts. The district court had previously noted that the PL Rescue Fund had a broader mission than did the class, including pressuring Maxxam to sell its interest in Pacific Lumber.

"The responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel." *Sullivan v. Chase Inv. Servs. of Boston, Inc.*, 79 F.R.D. 246, 258 (N.D. Cal. 1978). Plaintiffs argue that because the conduct of the litigation has shown no manifestation of divided loyalties, requiring withdrawal was improper. Plaintiffs misunderstand the law. The "appearance" of divided loyalties refers to differing and potentially conflicting interests and is not limited to instances manifesting such conflict. In *Sullivan*, the district court ordered withdrawal of counsel under a similar situation where there had as yet been no reason to believe improper influence had resulted from the representation of two participant's conflicting interests. *Id.* We find that the district court did not abuse its discretion in ordering Plaintiffs' counsel to withdraw from conflicting representation.

E. Prohibited Transaction Claims

1. The Purchase of Annuities from ELIC

[21] Plaintiffs next contend that the district court erred in granting Defendants' summary judgment motion on Plaintiffs' claim that certain transactions were "prohibited transactions"

within the meaning of ERISA § 406, 29 U.S.C. § 1106.[13] The first transaction at issue involved Defendants' purchase of annuities from ELIC. Plaintiffs asserted that this purchase constituted a prohibited transaction because Defendants selected ELIC in order to maximize their recovery of surplus plan assets, and therefore constituted a transfer for the benefit of a party in interest or self-dealing.

[22] This court rejected this same argument in *Waller v. Blue Cross of Cal.*, 32 F.3d 1337, 1346 (9th Cir. 1994):

> [P]urchasing replacement annuities as part of a plan termination even with such alleged infirmities is not the kind of transaction § 406 prohibits. As we explained in *M & R Inv. Co.*:
>
> > The party-in-interest prohibitions [under § 406(a)] act to insure arm's-length transactions by fiduciaries of funds subject to ERISA. A transaction with a party in interest is prohibited under the presumption that it is not arm's-

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[13] ERISA § 406, 29 U.S.C. § 1106, provides in relevant part:

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title: (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —

* * *

(D) transfer to, or use by or for the benefit of, a party, of any assets of the plan . . . .

* * *

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not —

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries . . . .

> length. The result is a broad per se prohibition of transactions ERISA implicitly defined as not arm's-length.
>
> 685 F.2d at 287. In other words, the transaction, itself, should communicate the breach. ERISA, however, permits the transaction that forms the basis for plaintiffs' § 406 claim — the purchase of annuities as part of a plan termination. *See* 29 U.S.C. § 1341(b)(3)(A)(i). Plaintiffs do not allege that either Executive Life or Provident is a party in interest. Absent such an allegation, we fail to see how purchasing annuities to terminate plaintiffs' Plan constitutes a per se violation of ERISA, even if accomplished through an infirm bidding process or for improper purposes. For the same reason, we also reject plaintiffs' § 406(b) claim.

Id. (quoting *M & R Inv. Co., Inc. v. Fitzsimmons*, 685 F.2d 283, 287 (9th Cir. 1982). The district court correctly found that the purchase of annuities form ELIC was not a prohibited transaction under ERISA § 406, 29 U.S.C. § 1106.

2. The Use of Residual Plan Surplus as Collateral

[23] Plaintiffs allege that PLC also engaged in a prohibited transaction in violation of ERISA § 406, 29 U.S.C. § 1106, in obtaining a bridge loan to finance MGI's takeover of PLC. In obtaining the loan, PLC pledged as collateral the right to receive the future residual distributions from the Plan after the Plan's termination, the purchase of annuities, and other required distributions. Plaintiffs asserted below that this transaction violated the prohibition in § 406 on dealing with a plan asset for the benefit of a party in interest. The district court dismissed this claim, ruling that the pledge of collateral was not a prohibited transaction because the collateral pledged was a contingent right and not an actual plan asset.

Neither Plaintiffs nor Defendants cite any authority addressing whether a contingent right to receive plan surplus following distribution constitutes a plan asset. Defendants cite numerous cases supporting the proposition that residual plan assets can legally revert to the employer after plan termination. However, this point is not disputed and is inapposite to

whether the use of a contingent right of reversion prior to plan termination constitutes a prohibited transaction. Defendants also cite case law on security interests indicating that the pledge of the right to receive anticipated funds is the pledge of a general intangible, not an interest in the underlying asset.

This court has adopted a broader functional definition of what constitutes an "asset of the plan" for purposes of § 406. In *Acosta v. Pacific Enterprises*, 950 F.2d 611 (9th Cir. 1991), this court stated:

> ERISA's legislative history makes clear that "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent these abuses in the future." In light of Congress' overriding concern with the protection of plan participants and beneficiaries, courts have generally construed the protective provisions of § 406(b) broadly . . . .
>
> Appellees argue that the term "assets of the plan" encompasses only financial contributions received by the plan administrators. We decline to cabin the term in such a restrictive definition. Congress' imposition of a broad duty of loyalty upon fiduciaries of employee benefit plans counsels a more functional approach. To determine whether a particular item constitutes an "asset of the plan," it is necessary to determine whether the item in question may be used to the benefit (financial or otherwise) of the fiduciary at the expense of plan participants or beneficiaries.

Id. at 620 (citations omitted). It is clear from *Acosta* that "assets of the plan" is not defined in strictly financial terms, but rather is determined by examining whether the "item in question may be used to the benefit (financial or otherwise) of the fiduciary at the expense of plan participants or beneficiaries." *Id.* In *Acosta*, the alleged "asset of the plan" was a participant-shareholder list. In *Acosta*, however, we did not reach the question of whether or not this list was a plan asset;

rather, we affirmed on the ground that the fiduciaries' use of the list did not constitute self-dealing. *Id.*[14]

Therefore, in this circuit there is a twofold functional test as to whether an item in question constitutes an "asset of the plan": (1) whether the item in question may be used to the benefit (financial or otherwise) of the fiduciary, and (2) whether such use is at the expense of the plan participants or beneficiaries. In this case, it is unquestionable that the contingent interest at issue was used to the benefit of the fiduciary, by helping finance the takeover. The question is whether it was used at the expense of the Plan participants.

[24] PLC correctly points out that the loan transaction did not jeopardize the assets of the Plan, nor did it affect Plaintiffs' vested benefits under the Plan. The loan document cited by Plaintiffs, which indicates that the loan would be in default if the plan incurred liabilities, evidences the bank's concern with its future interest, but it does not in any way indicate that the bank would be able to reach plan assets upon such a default. Therefore, the Plan assets were never at risk by being indirectly put up as collateral.

In enacting ERISA, Congress was concerned about the mismanagement of plan assets to the detriment of the plan and its beneficiaries. Although in this case the Plan assets themselves were never put at risk, the Plan fiduciary used funds — which were plan assets — as collateral for a purpose which did not benefit the Plan. The purpose and end result of this use was the termination of the Plan. While this did not directly hurt the beneficiaries, since annuities were purchased, it can hardly be argued that it was for the benefit of the Plan.

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[14]The only other case addressing the meaning of "assets of the plan" under § 406 is an Eleventh Court case which held that an employer's contingent and non-vested future retirement liabilities under a plan were not assets of the plan, and so could be used in the employer's own interest. *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987). However, that case is not analogous, because here the assets potentially affected are vested funds of the plan, not unvested liabilities.

It is clear from legislative history that in enacting § 406, Congress was not only concerned with deals between the plan and a fiduciary:

> As in other situations, this prohibited transaction may occur even though there has been no transfer of money or property between the trust and any party in interest. For example, securities purchases or sales by the trust in order to manipulate the prices of securities to the advantage of a party in interest constitute "a use by, or for the benefit of, a party in interest of any income or assets of the trust."

S. Rep. No. 383, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4982. The legislative history goes on to indicate a policy against conflicting interests when contemplating termination:

> The bill also treats as a prohibited transaction investments which jeopardize the income or assets of the trust. . . . Of course, the prohibited transaction provisions do not prevent an employer, on termination of his plan, form recovering assets not needed to pay plan benefits. . . . If termination is contemplated, it should be clear that investments are not being made or maintained with the interests of potential remaindermen in mind in any case where this is in conflict with the interests of the participants or beneficiaries.

Id. at 4984-85.

[25] In light of the legislative history revealing a policy against self-dealing in plan termination and this court's policy of interpreting the fiduciary duty broadly, we hold that the collateral for the bridge loan was a plan asset. Corporations should not be permitted to rely on their ERISA plan assets to finance takeovers or other risk ventures. One of the reasons § 406 was included in ERISA was that "Congress was apprehensive that exceptions to the common law rules against self-dealing were unduly eroding the underlying principle and included Section 406 as a barrier to such erosion." *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1215 (2d Cir. 1987) (citing S.Rep. No. 127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4865). It is

clear that the fiduciaries involved here had in mind only their own interests, or those of a party in interest, when setting up the bridge loan. Such conflicting loyalties should be discouraged. We reverse the district court's dismissal of this prohibited transaction claim.

F. Interim Attorney's Fees

Plaintiffs contend that the district court erred in concluding that an interim award of attorney's fees is unavailable under ERISA. Whether or not interim attorney's fees are available under ERISA is a question of law, which we review de novo. *See United States For Use and Benefit of Reed v. Callahan*, 884 F.2d 1180, 1185 (9th Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

In an ERISA action by a participant, beneficiary, or fiduciary, "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g). This language mirrors that regarding attorney's fees in civil rights actions. *See* 42 U.S.C. §§ 2000e-5(k), 2000a-3(b) & 1988. On the basis of nearly identical statutory language, we have held that as in civil rights cases awards of attorney's fees in ERISA litigation should ordinarily be granted:

> ERISA, like the Civil Rights Acts of 1871 and 1964, and the Labor-Management Reporting and Disclosure Act, is remedial legislation which should be liberally construed in favor of protecting participants in employee benefit plans. Section 502(g)(1), 29 U.S.C. § 1132(g)(1), authorizes the court to award attorney fees. This section "should be read broadly to mean that a plan participant or beneficiary, if he prevails in his suit under § 1132 to enforce his rights under his plan, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' "

Smith v. CMTA-IAM Pension Trust, 746 F.2d 587, 589 (9th Cir. 1984) (citations omitted). We held that in applying the factors adopted by this court in *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446 (9th Cir. 1980), the district court must

keep these remedial purposes in mind because "[a]n important aspect of that protection [ERISA] is to afford [participants and beneficiaries] effective access to federal courts." *Smith*, 746 F.2d at 589.

Plaintiffs argue that the Supreme Court has authorized interim attorney's fees under these same civil rights statutes on which this court relied in determining that ERISA's attorney's fees statutes must be construed in favor of attorney's fees absent special circumstances. *See, e.g., Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 790 (1989); *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980) (per curiam).[15] Therefore, Plaintiffs argue that by implication, the same interim attorney's fees should be available under ERISA.

The district court found that the policies behind ERISA, unlike those underlying civil rights statutes, do not justify interim attorney's fees. The court based this distinction on the fact that civil rights plaintiffs serve as "private attorneys general" in that they protect interests which benefit the general public. "In contrast, the policies underlying ERISA — while nevertheless important — 'do not rise to the level of assuring that all citizens are accorded their civil rights.' " (quoting *Ellison v. Shenango Inc. Pension Bd.*, 956 F.2d 1268, 1275 (3d Cir. 1992)). The district court reasoned that the ERISA plaintiff seeks a recovery only for a select number of individuals, not for the general public. Thus, less incentive in the form of attorney's fees is needed for private enforcement.

The cases on which the district court relied in denying attorney's fees were all cases dealing with whether or not to

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[15] It should be noted that interim attorney's fees under civil rights legislation are only available if a party has prevailed on the merits of at least some of its claims. *See Hanrahan*, 446 U.S. at 758. However, since the district court did not determine whether Plaintiffs prevailed on any claim, we need not reach that issue now. We only need examine whether or not interim attorney's fees are authorized under ERISA. The same holds true for the determination of whether the *Hummell* factors are met.

adopt the *Smith* "special circumstances rule" for awarding attorneys fees. *Ellison*, 956 F.2d at 1274-75; *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820 (7th Cir. 1984); *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255 (5th Cir. 1980). These cases used the same logic which the district court adopted to reject this standard under ERISA. However, as noted above, in *Smith*, this court accepted the special circumstances rule, analogizing to the civil rights legislation. Therefore, the district court's conclusion is somewhat suspect, since it relied upon logic in cases which came to the opposite conclusion to that reached by this court in *Smith*.

Once we accept a "remedial" standard for attorney's fees in ERISA cases, as we did in *Smith*, there are few distinctions between the interim award of attorney's fees in the ERISA context and under civil rights statutes. In both contexts, the litigant may not be able to continue pursuing the litigation unless attorney's fees are awarded whenever any relief is obtained.

[26] We hold that interim attorney's fees are available under ERISA to the extent that they are available under civil rights statutes. We reverse the district court on this issue and remand to determine whether Plaintiffs have prevailed on any issue, and whether the *Hummell* factors are met.[16]

AFFIRMED IN PART AND REVERSED IN PART

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[16] *Flanagan v. Inland Empire Elec. Workers Pension Plan*, 3 F.3d 1246, 1253-54 (9th Cir. 1993) is not dispositive of this issue. In that case, this court merely held that the reversal of summary judgment finding that plaintiffs lacked standing was not enough to justify attorney's fees, and was premature. The gist of this court's opinion was that a reverse of a standing determination did not constitute success " 'on any significant issue in litigation which achieves some of the benefit [they] sought in bringing suit.' " *Id.* at 1253 (quoting *Smith*, 746 F.2d at 589). Here, Plaintiffs claim to have achieved some benefit in the form of a Stipulated Order.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARENCE KAYES; GENE KENNEDY; SHARON KENNEDY; WILEY LACY; JOHN R. MAURER; LESTER REYNOLDS; SHIRLEY REYNOLDS; HOLLIS ROLLINS; DONALD FILBY; JACK MILLER; JAMES LOVELL; PAUL S. BRADY; WILFRED A. BLAIN; LLOYD S. TUCKER; DONALD J. SCHOENHOFER,
Plaintiffs-Appellants,

vs.

PACIFIC LUMBER COMPANY; MAXXAM GROUP, INC.; MAXXAM, INC.; CHARLES HURWITZ; PAUL N. SCHWARTZ; JAMES IACO; WILLIAM LEONE,
Defendants-Appellees.

UNITED STATES SECRETARY OF LABOR, amicus; AMERICAN ASSOCIATION OF RETIRED PERSONS (AARP), amicus,
Amicus Curiae.

No. 93-16271

CLARENCE KAYES; GENE KENNEDY; SHARON KENNEDY; WILEY LACY; JOHN R. MAURER; LESTER REYNOLDS, SHIRLEY REYNOLDS; HOLLIS ROLLINS; DONALD FILBY; JACK MILLER; JAMES LOVELL; PAUL S. BRADY; WILFRED A. BLAIN; LLOYD S. TUCKER,
Plaintiffs-Appellees,

v.

PACIFIC LUMBER COMPANY; MAXXAM GROUP, INC.; MAXXAM, INC.; CHARLES HURWITZ; PAUL N. SCHWARTZ; JAMES IACO; WILLIAM LEONE,
Defendants-Appellants.

UNITED STATES SECRETARY OF LABOR, amicus,
Amicus Curiae.

(Filed June 15, 1995)

No. 93-16575
DC# CV-89-03500-SBA
Northern District of California

ORDER

Before: CHOY, POOLE and REINHARDT, Circuit Judges.

The petition for rehearing is DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CLARENCE KAYES, et al.,
Plaintiffs,

v.

PACIFIC LUMBER COMPANY, et al.,
Defendants.

ROBERT REICH, Secretary of the U.S. Department of Labor,
Plaintiff,

v.

PACIFIC LUMBER COMPANY, et al.,
Defendants.

C-89-3500 SBA
C-91-1812 SBA

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THE *KAYES* CASE; GRANTING IN PART THE SECRETARY'S MOTION FOR SUMMARY ADJUDICATION OF THE FIDUCIARY STATUS ISSUE

(Filed May 17, 1993)

On May 11, 1993, the parties in both of these related cases appeared before the court for oral argument on several motions and cross-motions. For the reasons stated at oral argument, the court granted the joint-motion for preliminary approval of dismissal of the Executive Life Insurance Company defendant from the *Kayes* case, 89-3500; granted the

defendants' motion for summary judgment on the prohibited transactions claims[17] in the *Kayes* case, and denied plaintiffs' cross-motion; granted plaintiffs' cross-motions for summary adjudication in both cases regarding the fiduciary status of defendants Charles Hurwitz and William Leone; denied the plaintiffs' cross-motion and the defendants' motion for summary adjudication in both cases regarding the fiduciary status of defendants Maxxam Inc., Maxxam Group Inc., Paul Schwartz and James Iaco.[18]

Defendants' motion for summary judgment for lack of standing in the *Kayes* case was taken under submission. After further consideration of the authorities, and being fully informed, the court grants defendants' motion for summary judgment and dismisses the *Kayes* case for lack of standing.

I. BACKGROUND

The factual background concerning these cases has been described in previous orders and will be only briefly repeated here. In March, 1986, following the leveraged buyout of the Pacific Lumber Company ("Pacific Lumber") by defendant Maxxam Group Inc., Pacific Lumber terminated its retirement plan. At the time the plan had over three thousand participants and beneficiaries. Approximately one-third of the participants, who had benefits with an actuarial value less than $3,500, received a lump sum distribution for the full actuarial amount of their benefits. Annuities were purchased from the Executive Life Insurance Company ("ELIC") to satisfy the plan's obligation to the participants and beneficiaries who did not receive a lump sum distribution. Because the plan's assets exceeded the sum of the lump sum distribution and the purchase price of the annuities, Pacific Lumber received a substantial reversion.

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[17] Claims five and six.

[18] All parties agree that defendant, Pacific Lumber Company, was the named fiduciary of the retirement plan, and therefore the court now grants summary adjudication to the plaintiffs with respect to whether Pacific Lumber Company was a fiduciary.

ELIC's financial difficulties, which placed the annuities in jeopardy, prompted two lawsuits. On September 25, 1989, a group of former participants and beneficiaries filed the *Kayes* case. On June 12, 1991, the Secretary of Labor commenced a similar suit. Both actions allege that the defendants breached their fiduciary duty to the plan by selecting ELIC as the annuity provider.

II. ANALYSIS

As a preliminary matter, the plaintiffs assert that defendants have waived their right to challenge standing because they did not challenge capacity by "specific negative averment" in their answer to the complaint as required by Rule 9(a) of the Federal Rules of Civil Procedure. However, the current motion challenges standing, not capacity. Because the challenge is jurisdictional, Rule 9(a) is inapplicable.

Section 1132(a)(2) of Title 29 defines standing in ERISA cases brought to remedy a fiduciary breach.[19] It provides: "A civil action may be brought — (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title." Section 1109 imposes liability to the plan on fiduciaries who breach their fiduciary duties.

Defendants contend that the plaintiffs in the *Kayes* case are not participants or beneficiaries. These terms are defined in 29 U.S.C. § 1002. A "participant" is:

> any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7). A "beneficiary" is "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29

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[19]The Secretary also has standing under 29 U.S.C. § 1132(a)(5).

U.S.C. § 1002(8). Defendants argue that because the plan has terminated, and because each of the private plaintiffs have received an irrevocable commitment from an insurer to receive the full amount of benefits owed, they are not eligible to receive benefits from the plan, and therefore they are not participants or beneficiaries.

The Ninth Circuit addressed these definitions in *Kuntz v. Reese*, 785 F.2d 1410 (9th Cir. 1986). Relying on the plain meaning of the above provisions, the Ninth Circuit held that former participants and beneficiaries who had received all of the vested benefits owed them in a lump sum no longer had standing to sue on behalf of a terminated plan. Although all of the plaintiffs in *Kuntz* had received lump sum distributions, the court also reasoned that the analysis would apply where the former fiduciary arranged for an insurance company to make an irrevocable commitment to pay all of the benefits to which the former participants were entitled. *Id.* at 1412.

However, in *Amalgamated Clothing & Textile Workers v. Murdock*, 861 F.2d 1406 (9th Cir. 1988), the Ninth Circuit recognized an exception to the *Kuntz* holding. As in *Kuntz*, plaintiffs in *Murdock* had received all of the benefits to which they were entitled under the plan. However, the fiduciary in *Murdock* was alleged to have profited by means of a fiduciary breach. The court construed the alleged "ill-gotten profits" as "equitably vested benefits under an ERISA plan" in order to achieve the underlying purposes of the ERISA statute. *Id.* at 1419.

Murdock, however, must be viewed as a very limited exception to *Kuntz*. *Murdock* specifically limits its hold to "cases such as this one." *Id.* Furthermore, the court found that "granting plaintiffs standing . . . in this case is the only means available to give effect to the goals of ERISA." *Id.* at 1411.

The present case does not fit within the narrow exception. In the present case, the goals of ERISA can be fully vindicated by the Secretary's suit. In these circumstances, the court is unable to expand the definition of "participant" beyond what is allowed by the ERISA statute and the unambiguous

holding in *Kuntz*. Thus, defendants' motion for summary judgment based on standing is granted. Based on the above analysis,

IT IS HEREBY ORDERED THAT

(1) Defendants motion for summary judgment in the *Kayes* case is GRANTED.

(2) The Secretary's motion for summary adjudication of the fiduciary status issue is GRANTED with respect to defendants Pacific Lumber, Charles Hurwitz, and William Leone. With respect to the other defendants, the motion and cross-motion for summary adjudication of the fiduciary status issue is DENIED.

IT IS SO ORDERED.

Dated: May 14, 1993

/s/ Saundra B. Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CLARENCE KAYES, et al.,
Plaintiffs.

vs.

PACIFIC LUMBER COMPANY, et al.,
Defendants.

C-89-3500 SBA

JUDGMENT

(Filed May 17, 1993)

In accordance with this court's order granting summary judgment to the defendants on the basis of standing

IT IS HEREBY ORDERED THAT judgment be entered in favor of the defendants.

IT IS SO ORDERED.

Dated: May 14, 1993

/s/ Saundra B. Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

APPENDIX D

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent text of ERISA section 3(7), ERISA section 3(21)(A), ERISA section 402, ERISA section 405(c), ERISA section 406 and ERISA section 502(a), the statutes involved in this case, are set forth below.

ERISA § 3(7), 29 U.S.C. § 1002(7)

The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A)

Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B).

ERISA § 402, 29 U.S.C. § 1102

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or

severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan

Every employee benefit plan shall —

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) Optional features of plan

Any employee benefit plan may provide —

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 1105(c)(1) of this title, may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint

an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

ERISA § 405(c), 29 U.S.C. § 1105(c)

(c) Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities

(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that —

(A) the named fiduciary violated section 1104(a)(1) of this title —

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a) of this section.

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 1102(c)(3) of this title.

ERISA § 406, 29 U.S.C. § 1106

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not —

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest

A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

ERISA § 502, 29 U.S.C. § 1132

(a) Persons empowered to bring a civil action

A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this subtitle or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

(2)

No. 95-220

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

THE PACIFIC LUMBER COMPANY; MAXXAM GROUP INC.; MAXXAM INC.; CHARLES HURWITZ; PAUL N. SCHWARTZ; JAMES IACO; WILLIAM LEONE,

Petitioners,

vs.

CLARENCE KAYES; GENE KENNEDY; SHARON KENNEDY; WILEY LACY; JOHN R. MAURER; LESTER REYNOLDS; SHIRLEY REYNOLDS; HOLLIS ROLLINS; DONALD FILBY; JACK MILLER; JAMES LOVELL; PAUL S. BRADY; WILFRED A. BLAIN; LLOYD S. TUCKER; DONALD J. SCHOENHOFER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

Respondents-Plaintiffs restate the Third Question in the Petition as follows:

3. Did the Ninth Circuit correctly apply the functional test of fiduciary status under ERISA Section 3(21)(A), which this Court endorsed in *Mertens v. Hewitt Associates*, 508 U.S. ___, 113 S.Ct. 2063, 124 L.Ed. 2d 161 (1993), in upholding the district court's finding that Petitioners Hurwitz and Leone acted as fiduciaries in selecting an annuity provider upon plan termination?

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To the Honorable Supreme Court:

The Respondents, Clarence Kayes, et al., respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the Ninth Circuit's decision in this case. That decision is reported at 51 F.3d 1449 (9th Cir. 1995) and is reprinted at pages 1-41 in Petitioners' Appendix.

STATEMENT OF THE CASE

Respondents incorporate the "Factual and Procedural Background" in the opinion below, *Kayes v. Pacific Lumber Company*, 51 F.3d 1449, 1453-54 (9th Cir. 1995). Because Petitioners ignore relevant facts – particularly the active roles Defendants Hurwitz and Leone played in the selection of Executive Life as the annuity provider for the retirees and participants of the Plan – Respondents will supplement the Court of Appeals' factual and procedural statement accordingly. In addition, because Petitioners include in their analysis of the First Question Presented an issue which neither the district court nor the Court of Appeals has ruled upon – whether Plaintiffs have standing to allege prohibited transaction claims under ERISA, as amended by PAPA – Respondents set forth the procedural history of the section 406 prohibited transaction claim, which involved Defendants' use of residual plan assets as collateral for a bridge loan. That history establishes that Petitioners have not timely raised the issue of Plaintiffs' standing. Rather, the only issue involving Defendants' use of residual plan assets which the parties litigated and which the lower courts decided involved the

single question of whether Defendants' collateralization of "excess" pension assets implicated "plan assets". *Kayes, supra,* at 1466-1468.

Plaintiff-Respondents' ("Plaintiffs" or "Respondents") ERISA action arose out of Defendant-Petitioners' 1986 termination of the Pacific Lumber Company Pension Plan ("Plan") and purchase of a group annuity contract from the now defunct Executive Life Insurance Company ("ELIC"). Defendant-Petitioners ("Defendants" or "Petitioners") had purchased ELIC's group annuity contract in order to provide the Plan's participants, beneficiaries, and retirees with the monthly retirement benefits they were entitled to receive under the provisions of the Plan. ER 100.[1] The Plan's termination followed petitioner Maxxam's successful takeover of the Pacific Lumber Company ("PL") – a hostile takeover financed in large part by ELIC's direct and indirect acquisition of almost 22% of the $450 million in "junk" bonds issued by Maxxam to finance its acquisition of PL. ER 100. Plaintiffs alleged that by selecting ELIC, Defendants had acted imprudently and out of self-interest in violation of ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B). ER 113-115. Plaintiffs further alleged that Defendants had committed a breach of ERISA section 406 by pledging PL's anticipated receipt of the Plan's "excess" assets as

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[1] Throughout this Opposition, the following abbreviations are used: "ER" (Excerpts of Record filed with the Ninth Circuit); "CR" (Clerk's Record); "Pet. App." (Appendix attached to Defendants' Petition); "Resp. App." (Appendix attached hereto).

collateral for a "bridge loan" Maxxam obtained to facilitate its hostile purchase of PL. ER 117-120. The Court of Appeals held, *inter alia*, that Plaintiffs had standing to bring their section 404 claims based on the selection of ELIC (reversing the district court), that Defendants Hurwitz and Leone were fiduciaries under ERISA's functional definition (upholding the district court), and that Defendants' use of anticipated "excess" pension assets as collateral for a bridge loan supported Plaintiffs' claim that Defendants used Plan assets in a prohibited transaction (reversing district court).

A. Procedural Background Of Prohibited Transaction Claim.

On March 30, 1993, Defendants filed motions for summary judgment on the following grounds: (1) Plaintiffs lacked standing to sue for section 404 breaches of fiduciary duty because the Plan had been terminated; (2) Plaintiffs' section 406 prohibited transaction claims failed because Defendants had neither pledged, nor otherwise adversely affected, any assets of the Plan; and (3) Six of the seven Defendants were not fiduciaries of the Plan.

At a hearing on May 11, 1993, the district court granted summary judgment to Defendants on Plaintiffs' section 406 prohibited transaction claims on the exclusive ground that the challenged transactions did not involve plan assets. ER 1685-89. By order dated May 17, 1993, the district court granted summary judgment to Defendants on Plaintiffs' other claims, holding that Plaintiffs lacked standing to sue Defendants for section 404 breaches of fiduciary duty. ER 1644-49. Thus, the district court never

ruled on Plaintiffs' standing to allege prohibited transaction claims.

Nor did the Court of Appeals address the standing issue in the context of the prohibited transaction claims. Petitioners failed to raise that issue in a timely fashion. In all of their briefs to the Ninth Circuit, including the post-PAPA letter-brief of November 1, 1994 and their Petition For Rehearing (both of which addressed PAPA), Petitioners omitted mention of their current view that the statute denies standing to Respondents to allege prohibited transaction claims. Petitioners first raised this issue in their May 19, 1995 "Application to File Amendment to Petition for Rehearing". Resp. App. 14-24. Thus, Petitioners' self-styled "Amendment" constituted a new and untimely second petition for rehearing, and the Ninth Circuit denied Petitioners' leave to file their "Amendment" by order dated June 7, 1995. Resp. App. 29-30.

B. Facts Establishing The Fiduciary Status Of Hurwitz And Leone.

Effective March 31, 1986, PL terminated the Plan. Between March and October, 1986, a team of Maxxam and PL officers and employees obtained, and then evaluated, bids from life insurance companies to provide a group annuity contract. Although not on the list of insurers from which bids were to be solicited, ELIC was added to the list at Petitioner Hurwitz' insistence. ER 1314 - 1321; 1441.

Petitioner Leone headed the team of Maxxam and PL employees which implemented the annuity selection process. ER 1266; 1270; 1323 - 1325. Hurwitz also appointed

Petitioners Schwartz and Iaco to this team (*id.*), even though they were employees of Maxxam, not of PL. Petition at 6.[2]

In the course of the bidding process, PL's Vice President for Finance and Treasurer, Vincent Garner, wrote a memorandum to Leone, detailing problems with ELIC, including its large junk bond holdings, its role in Maxxam's takeover of PL, and its questionable reinsurance practices. ER 342 - 344. PL's own consultant, Conning & Co., had rated ELIC only "average," a lower rating than most of the other insurers under consideration. ER 105 - 106; 304, 311 - 316. Leone discussed Garner's memo with Hurwitz and wrote a rebuttal memo to Garner. ER 1272; 1366.

At an October 1, 1986 meeting in which both Leone and Hurwitz participated, Petitioners selected ELIC to provide the group annuity. ELIC's bid of $37.2 million was the lowest; Metropolitan Life's bid of $39.9 million was the next lowest, a difference of $2.7 million. ER 105:22-24; CR 387, p. 5, fn. 5. Hurwitz suggested that Metropolitan Life be contacted to see whether it would lower its final bid. ER 357 - 358; 381 - 382; 1289; 1333 - 1334. When Metropolitan Life refused, both Hurwitz and Leone voted to select ELIC. ER 1331.

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[2] Petitioners' contention that all of the individuals who participated in the selection of the ELIC annuity were acting as employees of PL and not as individual fiduciaries (Petition at 2-3; 25), does not square with their simultaneous admission that Schwartz and Iaco were employed by Maxxam. Petition at 6.

During the October 1st meeting, Hurwitz telephoned Garner to rebuke him for raising questions about ELIC. ER 295:12-25.

REASONS FOR DENYING THE WRIT

Petitioners fail to satisfy any of the criteria traditionally applied by the Court in determining whether to grant a Writ of Certiorari. First, Petitioners point to no current, real or intolerable conflict among the circuits regarding any Question Presented by their Petition.

Second, in a successful effort to discourage the type of plan termination which is the subject of the instant action, Congress has imposed a series of excise taxes (currently potentially 50%) on reversions to corporate sponsors of "surplus" assets. Thus,

> The reversions that now occur mostly arise in connection with the dissolution of the plan sponsor. The type of transaction that drove the 1980s boom in asset reversion, that is, terminating the plan of a continuing firm in order to capture the reversion, *has largely ceased.* (Emphasis added.)

John H. Langbein and Bruce A. Wolk, *Pension and Employee Benefit Law,* Foundation Press (2nd ed. 1995)[3]

[3] A ten percent nondeductible excise tax on asset reversions received from a qualified plan after December 31, 1985 was enacted as part of the Tax Reform Act of 1986. IRC § 4980. In 1988, the 10 percent tax on reversions was temporarily raised to 15 percent. Technical and Miscellaneous Revenue Act (TAMRA)

Third, no compelling reason exists for this Court to review Petitioners' arguments regarding both the standing of Plaintiffs to sue for ERISA section 406 prohibited transactions and the remedies available for Defendants' alleged breaches of sections 404 and 406 – issues not decided by the lower courts.

Fourth, the Court of Appeals properly decided that the pension assets Defendants pledged as security for their bridge loan were "plan assets" under ERISA's prohibited transaction rules. In so holding, the Court of Appeals decided a question of first impression which does not warrant review by this Court.

Finally, the roles played by Defendants Hurwitz and Leone in selecting the ill-fated ELIC annuity – facts which Petitioners simply ignore – establish that the lower courts properly applied ERISA's functional test of fiduciary status. Both of these Defendants were, indeed, ERISA fiduciaries of the Plan.

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of 1988, §§ 5072 and 6069, amending IRC §§ 4980(a)and (c). The Omnibus Budget Reconciliation Act of 1990 (OBRA 1990) amended IRC § 4980(a) to increase the tax on reversions from 15% to 20%. OBRA 1990 also added new IRC § 4980(d), further increasing the tax on employer reversions to 50% unless the employer either (A) established a "qualified replacement plan," or (B) increased benefits under the terminating plan *pro rata* for each participant by a minimum of 20% of the expected reversion. *See* Yale D. Tauber & William A. Bader, *Surplus Pension Assets: History and Opportunity*, 18 J. Pension Planning & Compliance 19 (1992).

A. Neither Respondents' Standing To Allege Claims For Prohibited Transactions Nor The Scope Of Remedies Available To Respondents Was Argued Or Decided In The Courts Below; There Is No Compelling Reason For This Court To Address Either Issue.

Reversing the district court, the Ninth Circuit held that Plaintiffs have standing under Section 502(a) of ERISA to pursue their claims that Defendants violated ERISA § 404(a) in selecting Executive Life as the annuity provider upon termination of the Plan. *Kayes*, 51 F.3d at 1454-55. Petitioners now concede that Respondents have standing to assert such claims for breach of fiduciary duty (Petition at 15), but argue that this Court should grant *certiorari* in order to hold that Respondents do not have standing to assert a prohibited transaction claim arising out of the bridge loan. (Id. at 16.) Petitioners also seem to contend that the Ninth Circuit has impermissibly expanded the remedies available to Plaintiffs. (Id. at 17.)

However, as indicated in the procedural history set forth above (*supra*, pp. 3-4), the district court did not hold that Plaintiffs lacked standing to assert their prohibited transaction claim under ERISA Section 406, nor did Defendants raise that issue on appeal to the Ninth Circuit. Accordingly, the Ninth Circuit did not decide the question. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970); *United States v. Mendenhall*, 446 U.S. 544, 551-552 n. 5 (1980). No "unusual circumstances" warrant the grant of *certiorari* on the issue of Plaintiffs' standing under Section 406. *See Berkemer v. McCarty*, 468 U.S. 420, 443, n. 38 (1984).

Moreover, the courts below would not have broken new ground nor created a conflict with other circuits had they in fact reached this standing question. Even before PAPA added section 502(a)(9) to ERISA, participants of terminated pension plans had standing to seek a constructive trust remedy for violations of ERISA's fiduciary duty provisions, including prohibited transactions. *See Amalgamated Clothing & Textile Workers v. Murdock*, 861 F.2d 1406, 1416-19 (9th Cir. 1988); *Waller v. Blue Cross of California*, 32 F.3d 1337, 1339-40 (9th Cir. 1994). No significant split in authority exists on this standing issue. *See Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1221-22 (5th Cir. 1992) (following *Murdock*). In *Teagardner v. Republic-Franklin, Inc. Pension Plan*, 909 F.2d 947 (6th Cir. 1990), *cert. denied*, 498 U.S. 1027, 111 S.Ct. 678, 112 L.Ed. 2d 670 (1991), cited by Petitioners, the Sixth Circuit merely distinguished *Murdock* as limited to situations involving misuse of plan assets. 909 F.2d at 953. Plaintiffs' prohibited transaction claim involves just such a situation. In addition, the Sixth Circuit has criticized its *Teagardner* decision and has broadened its analysis of standing under ERISA. *Swinney v. General Motors Corp.*, 46 F.3d 512, 518 (6th Cir. 1995).

PAPA did not narrow participants' standing under Section 502(a). Thus, PAPA states that "[n]othing in this Act shall be construed to limit the legal standing of individuals to bring a civil action as participants or beneficiaries under section 502(a)" of ERISA. Resp. App. 7. As Representative Pat Williams, who introduced PAPA onto

the floor of the House (see 140 Cong. Rec. H 10621-02), stated:

> S.1312 does not represent a change from current law, but rather a clarification made necessary because of recent court decisions. The courts have wrongly held that annuitants are not plan participants and therefore lack standing under ERISA to challenge the decision of the plan fiduciary to dispose of plan assets by purchasing annuities.
>
> Because S.1312 is designed to overturn this line of specific court cases, no limiting inference should be drawn with respect to standing questions for annuitants under any other section of any title of ERISA. To the contrary, other standing issues should be guided by the broad remedial policy reflected in today's legislative clarification, not by the incorrect court holdings that we reject today.

140 Cong. Rec. H 10621 (October 3, 1994).

Petitioners also contend that the Ninth Circuit's opinion permits Plaintiffs to pursue remedies beyond those available under ERISA.[4] They do not specify, however, exactly what remedies they contend the Court of Appeals

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[4] Petitioners appear to confuse the scope of remedies permitted under section 502(a)(9) with the issue of standing, arguing that *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed. 2d 96 (1985) and *Mertens v. Hewitt Associates*, 508 U.S. ___, 113 S.Ct. 2156, 104 L.Ed. 2d 161 (1993) "require ERISA's standing provisions to be strictly construed." Petition at 13. However, the word "standing" does not appear in either *Russell* or *Mertens* – both decisions concern the remedies available under ERISA, not standing.

has erroneously authorized. Nor can they do so at this procedural juncture of the litigation. Following trial, if Plaintiffs are successful, the district court will impose such remedies as it deems "appropriate relief." At that point – not beginning in the Supreme Court, Petitioners could seek a review of any such remedies as may have been awarded to Plaintiffs.

Nevertheless, Petitioners argue that the Ninth Circuit's reversal of Plaintiffs' prohibited transaction claim regarding the bridge loan included a decision on the issue of available remedies. That argument is specious. As demonstrated above (*supra*, pp. 3-4), the only prohibited transaction issue Petitioners presented to the Ninth Circuit involved the question of whether or not they pledged a "plan asset" in agreeing to the bridge loan.

Finally, Petitioners imply that the Ninth Circuit impermissibly extended the remedies available to Plaintiffs on their claims that Petitioners breached fiduciary duties in selecting Executive Life. (Petition at 17.) The Ninth Circuit, however, did not address the issue of remedies for those breaches – it merely reversed in part and remanded a grant of summary judgment in favor of Petitioners with regard to Plaintiffs' standing to pursue those breach of fiduciary duty claims under Section 502(a) (now conceded by Defendants to be allowed by PAPA). The Ninth Circuit did not award summary judgment to Plaintiffs, let alone order remedies. Petitioners do not point to any remedies sought by Respondents for

these breaches of fiduciary duty which Petitioners contend are beyond the scope of those allowed by ERISA.[5]

There is simply no reason for the Court to grant *certiorari* in order to address amorphous issues which were not decided by the courts below.

B. In Deciding A Question Of First Impression, The Ninth Circuit Properly Found That The Pension Assets Pledged As Collateral For The Bridge Loan Were "Assets Of The Plan" Under ERISA's Prohibited Transaction Rules.

As noted by the Ninth Circuit, the quesiton of "whether a contingent right to receive plan surplus following distribution constitutes a plan asset" is a question of first impression which has not been addressed by any other circuit. *Kayes*, 51 F.3d at 1466 and fn. 14. Therefore no conflict among the circuits exists. Moreover, this question arises under now unusual circumstances which are unlikely to recur: PL pledged its right to receive residual Plan assets as collateral for a bridge loan used to refinance the PL takeover before the Plan distributed assets or purchased a replacement group annuity. This pledge effectively required Petitioners to obtain a reversion of

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[5] In any event, section 502(a)(9) authorizes Respondents to obtain "appropriate relief", thus making available a broad range of remedies. *Compare, Mertens v. Hewitt Associates, supra* (narrow scope of remedies available under Section 502(a)(3), which authorizes "appropriate *equitable* relief" only. PAPA was introduced and enacted just after *Mertens*.

Plan assets of not less than $50 million. It is unlikely that a review based on these facts will have any significant impact beyond this case.[6]

This Court has adopted a broad definition of "plan assets" with regard to ERISA fiduciary issues. *John Hancock Ins. Co. v. Harris Trust & Savings Bank*, 114 S.Ct. 517, 126 L.Ed.2d 524 (1993) ("free funds" under group annuity contract do not qualify for guaranteed policy exception to "assets of such plan" under ERISA 401(b)(2)). Nevertheless, Petitioners urge that the term "assets of the plan" be construed narrowly under ERISA section 406. Petition at 19-21. The Ninth Circuit correctly found that the expected residual pension assets pledged as collateral were "assets of the plan" under section 406:

> In light of the legislative history revealing a policy against self-dealing in plan termination and this court's policy of interpreting the fiduciary duty broadly, we hold that the collateral for the bridge loan was a plan asset. Corporations should not be permitted to rely on their ERISA

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[6] The 1986 excise tax was meant to discourage terminations for reversion. (*See, supra,* at pp. 6-7 n.3.) The before-and-after data imply that the measure was quite successful. For the two years 1985-86, 848 such terminations affecting 956 thousand particpants occurred, yielding reversions in excess of $10.9 billion. By contrast, in 1988 after the excise tax was in effect, there were seven such reversions affecting three thousand participants and amounting to $36.8 million. *See* Employee Benefit Research Institute, Questions and Answers about Employee Benefits, EBRI Issue Brief 10 (Table 12) (May 1988).

> plan assets to finance takeovers or other risk ventures.

Kayes, 51 F.3d at 1468.

Petitioners assert that the pledge of Plan assets as collateral should not be a prohibited transaction because it "did not jeopardize assets of the Plan, or affect [Respondents'] vested benefits". Petition at 20. However, "the question of whether [a prohibited transaction rule of] ERISA has been violated does not depend on whether harm results from the transaction. Congress was concerned in ERISA to prevent transactions which offered a high potential for loss of plan assets or for insider abuse. . . . " *Marshall v. Kelly*, 465 F.Supp. 341, 354 (W.D.Okla. 1978). *See also, Commissioner v. Keystone Consol. Indus.*, 508 U.S. ___, 113 S.Ct. 2006, 2012, 124 L.Ed. 2d 71 (1993) ("Congress' goal was to bar categorically a transaction that was likely to injure the pension plan.").

Here, the Plan's liabilities had not been satisfied and no Plan assets had been distributed at the time of the bridge loan. Petitioners did not select ELIC as the group annuity provider until three months after Maxxam pledged its expected reversion of Plan assets as collateral. ER 1061. Thus, Maxxam became obligated to obtain a reversion of at least $50 million from the Plan – $25 million as collateral for the bridge loan and $25 million to remain in PL – *or* to use its own funds to meet their obligations, *or* to obtain more expensive financing. Obviously, such a pledge gave rise to a high potential to sacrifice retiree security in order to maximize the reversion.

Petitioners cite authority from bankruptcy and property law in support of their argument that the residual Plan assets pledged as collateral were not "assets of the Plan." Petition at fn. 14 and 20. Regardless of whether these cases are correct for the purpose of determining which of a sponsoring employer's creditors has the right to residual assets when received, these cases are not relevant for the purpose of determining whether the pledge of such assets constitutes a prohibited transaction within the meaning of ERISA section 406. Therefore, the Ninth Circuit rejected Petitioners' restrictive definition of "assets of the plan", and held that this term "is not defined in strictly financial terms, but rather is determined by examining whether the 'item in question may be used to the benefit (financial or otherwise) of the fiduciary at the expense of plan participants or beneficiaries'." *Kayes*, 51 F.3d at 1467 (citing *Acosta v. Pacific Enterprises*, 950 F.2d 611, 620 (9th Cir. 1991).) Respondents entirely ignore the facts regarding their pre-termination pledge of plan assets because those facts were pregnant with the potential for abuse and risk.[7]

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[7] Prior to the selection of an annuity provider, in July 1986, Maxxam received a bridge loan from a consortium of banks led by Irving Trust to refinance $100 million in debt from the PL buyout. ER 1178. To obtain this bridge loan, Maxxam pledged as collateral $25 million in Plan assets it expected to receive as a reversion following Plan termination. ER 107. By agreement dated July 10, 1986, Maxxam executed a "Pension Pledge and Security Agreement" with Irving Trust, pledging the "surplus" Plan assets, less $25 million, as collateral for the bridge loan. ER 1232, 1061. (Other agreements had already obligated Maxxam to leave at least $25 million of the surplus Plan assets with PLC. ER 1256.) The Pension Pledge Agreement included a covenant that

The Ninth Circuit's holding also is in accord with statutory provisions and Supreme Court precedent regarding the reversion of surplus plan assets after plan termination. ERISA section 4044(d) provides that upon termination,"residual assets" may be distributed to the employer only *after* all liabilities of the plan to participants and their beneficiaries have been satisfied. *See, Mead Corp. v. Tilley*, 490 U.S. 714, 718, 109 S.Ct. 2156, 2160, 104 L.Ed.2d 796 (1989) ("If funds remain *after* 'all liabilities of the plan to participants and their beneficiaries have been satisfied,' they may be recouped by the employer.") (emphasis added); *Fuller v. FMC Corp.*, 4 F.3d 255, 263 (4th Cir. 1993) ("to fulfill the duties imposed by [ERISA section 4044], the administrator must pay all liabilities before concluding that excess assets exist which may be returned to the employer.") Thus, at the time of the bridge loan, the $25 million in Plan funds Petitioners pledged as collateral were Plan assets because the Plan had not yet satisfied its liabilities to participants and beneficiaries through the purchase of a group annuity.

C. The Ninth Circuit Properly Upheld The District Court's Determination That Defendants Hurwitz And Leone Were ERISA Fiduciaries Under The Functional Test.

In an attempt to manufacture a split among the circuits, Petitioners mischaracterize the Ninth Circuit's

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Maxxam "shall use its best efforts and will take (or cause to be taken) all such other action as may be necessary or desirable, or which may be reasonably requested by Irving to procure the Excess Pension Assets." ER 1235-36.

analysis in affirming the fiduciary status of Petitioners Hurwitz and Leone. Following this Court's holding in *Mertens*, the Ninth Circuit applied the functional test of fiduciary status:

> The Supreme Court has held that ERISA "defines 'fiduciary' not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan, thus expanding the universe of persons subject to fiduciary duties and to damages under Section 409(a)."

Kayes, 51 F.3d at 1459, quoting *Mertens*, 113 S.Ct. at 2071. The Ninth Circuit rejected Petitioners' argument that there should be an exception to the functional test – an exception shielding from fiduciary responsibility any corporate officer who exercises control and authority over a plan on behalf of a named fiduciary corporation. *Id.* at 1459-61.[8]

Petitioners distort the Ninth Circuit's holding in *Kayes* by falsely characterizing it to mean that "all officers

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[8] Petitioners erroneously assert that the Fifth and Seventh Circuits have narrowly interpreted the definition of a fiduciary under ERISA Section 3(21)(A). Petition at 23. The Seventh Circuit has stated that it has "consistently" given a "broad reading" to the ERISA definition of fiduciary. *Mutual Life Ins. Co. of New York v. Yampol*, 840 F.2d 421, 425 (7th Cir. 1988). The Fifth Circuit has given "the term fiduciary a liberal construction in keeping with the remedial purpose of ERISA." *American Fed. of Unions Local 102 Health & Welfare Fund v. Equitable Life Assur. Soc.*, 841 F.2d 658, 662 (5th Cir. 1988). In fact, "[i]t is universally recognized that the definition of fiduciary in section 3(21) is broad and should be broadly construed." Stanley, "The Definition of a Fiduciary Under ERISA: Basic Principles", 27 *Real Prop., Prob. and Trust J.*, 240 (Summer, 1992).

and directors of a corporate named fiduciary slip into the named fiduciary's shoes and become individual ERISA fiduciaries, regardless of the role that the person may have played in the decision of the plan fiduciary." Petition at 24. In fact, the Ninth Circuit merely reaffirmed that the functional test of fiduciary status applies to all persons, including corporate officers and directors.

Petitioners also overstate the Third Circuit's holding in *Confer v. Custom Engineering*, 952 F.2d 34 (3d Cir. 1992) in order to create the impression of a conflict between the Third and Ninth Circuits. In *Confer*, the Third Circuit held that corporate officers were not fiduciaries of an ERISA plan " . . . *solely by reason of holding office.*" *Id.* at 37; emphasis added. The *Confer* majority endorsed Judge Seitz's concurrence in holding that "officers of a corporation 'may assume fiduciary status even absent a designation as the named fiduciary or trustee of the plan, *by performing functions that fulfill the statutory definition of a fiduciary.*' " *Id.* 37, fn. 3, quoting from concurrence, *Id.* at 39; emphasis added. As Judge Seitz explained, the individual Defendants in *Confer* had not exercised any fiduciary discretion in executing a plan amendment for the plan sponsor, and the complaint contained no allegations that "would support a finding that [the sponsor's officers] assumed fiduciary status." *Id.* at 40.[9]

In short, *Confer* does not hold that ERISA's functional test of fiduciary status can be evaded by the simple

---

[9] The Ninth Circuit panel accepted Petitioners' reading of the Third Circuit's holding in *Confer* and therefore also overstated the differences between the two circuits. *Kayes*, 51 F.3d at 1459.

expedient of naming a corporate fiduciary in the plan instrument. *Confer*, in fact, supports the functional test of fiduciary status articulated in the Ninth Circuit's opinion and endorsed by this Court in *Mertens*. No real conflict exists between the Ninth and Third Circuits.[10]

Previously, Petitioners have not disputed that Hurwitz and Leone were plan fiduciaries under the functional test. *See, e.g., Kayes*, 51 F.3d at 1459 ("PL does not claim under this functional test that Hurwitz and Leone are not fiduciaries."). Now, however, Petitioners assert that the record contains no evidence that Hurwitz or Leone engaged in conduct that could have made them fiduciaries as a matter of fact or law. Petition at 26-27.

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[10] All post-*Confer* decisions which cite that case limit its holding as described in Judge Seitz's concurrence. *See, Tybout v. Karr Barth Pension Admin., Inc.*, 819 F. Supp. 371, 377 (D.Del. 1993) (citing Judge Seitz's concurrence); *Robco of America, Inc. v. Insurance Company of North America, et al.*, 845 F. Supp. 1112, 1116 (W.D.Pa. 1994) (" . . . Diversified's role in administering the Plan did not give rise to the level of discretionary control requisite to render it a fiduciary under Sec. 1109," citing *Confer*); *Professional Helicopter Pilots Association v. Denison*, 804 F. Supp. 1447, 1451 (M.D. Ala. 1992) (corporate status does not by itself render a corporate officer an ERISA plan fiduciary (citing *Confer*), but " . . . a person may be considered a fiduciary of a plan if he exercises individual discretionary authority over the plan and its assets"); *McLaughlin v. Compton*, 834 F. Supp. 743, 751, fn. 6 (E.D. Pa. 1993), *aff'd in relevant part and rev'd in other part, sub nom. Reich v. Compton*, 57 F.3d 270, 279 fn. 13 (3d Cir. 1995) (citing with approval *Confer*'s reference (at p. 37 n. 4) to *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1220 (2d Cir. 1989) which held that where a corporation is a fiduciary, misuse of corporate form can lead to a finding of individual fiduciary liability on part of corporations's officers or to piercing the corporate veil.)

Petitioners have conveniently forgotten Hurwitz' and Leone's conduct which led to the imprudent selection of ELIC as the Plan's annuity provider. The facts set forth in Respondents' Statement of the Case give sufficient detail to show that Hurwitz and Leone acted as fiduciaries. For example, Hurwitz and Leone rebuked PL's Vice-President of Finance, Vincent Garner, for raising questions about ELIC during the annuity selection process. Mr. Garner had warned Leone about ELIC's junk bond portfolio and suspect reinsurance practices – the very problems which led to ELIC's bankruptcy. Thus, there is no reason why this Court should reexamine the evidentiary record which led both the district court and the Ninth Circuit to conclude that Hurwitz and Leone acted as fiduciaries in selecting ELIC as the Plan's annuity provider.

CONCLUSION

For all of the foregoing reasons, Respondents pray that the petition for writ of certiorari be denied.

Dated: September 6, 1995

Respectfully submitted,

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October 26, 1994

(Filed Oct. 27, 1994)

BY OVERNIGHT DELIVERY

Clerk
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For The Ninth Circuit
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121 Spear Street
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San Francisco, CA 94119-3939

Re: ***Milier, et al. v. Pacific Lumber Co., et al.***
Nos. 93-16271/93-16575

Dear Clerk:

Please advise the Court that on October 22, 1994, the President signed into law the Pension Annuitants Protection Act of 1994 ("PAPA") which renders moot the district court's Order of May 17, 1993 and Final Judgment of May 25, 1993 dismissing plaintiffs' complaint on the grounds that they lacked standing under ERISA §§ 502 and 409.

PAPA requires that the district court's standing order be vacated; none of the remaining issues on appeal arise from final, non-appealable orders. Therefore, the Court

should vacate the district court's standing order and remand with instructions that the provisions of PAPA be applied.

The Annuitant's Protection Act of 1994 (attached hereto as Exhibit A) amends ERISA § 502(a), 29 U.S.C. § 1132(a), to clarify that participants and beneficiaries of a terminated plan have standing to bring a civil action "in the event that the purchase of an insurance contract or insurance annuity in connection with the termination of an individual's status as a participant covered under a pension plan" constitutes a violation of ERISA's fiduciary responsibility provisions or the plan. Such action may seek "to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts." This amendment applies to any legal proceeding pending or brought on or after May 31, 1993.

Thus, the PAPA amendment of ERISA resolves in plaintiffs' favor the standing issue raised in the instant appeals and briefed extensively by all parties and *amici*. *See* Appellants' Opening Brief, pp. 9 - 17; Appellees' Answering/Opening Brief, pp. 10 - 18; Appellants' Reply Brief, pp. 1 - 5; Appellees' Reply Brief, pp. 1 - 9; Secretary of Labor's Brief As *Amicus Curiae*, pp. 9 - 19; American Association of Retired Persons' Brief as *Amicus Curiae*, pp. 4 - 10.

Because of the enactment into law of PAPA, the district court's standing order must be vacated. (*See, Lewis v. Continental Bank Corp.*, 110 S.Ct. 1249 (1990) (lower court's

order vacated, where, after court of appeals decision, Congress amended the federal banking law to make clear that state officials had the power they claimed to exercise); *In re Bunker Ltd Partnership*, 820 F.2d 308 (9th Cir. 1987) (where amended statute gave agency right to administrative warrant, dispute over agency's ability to obtain warrant under original statute rendered moot.)

Moreover, the district court's dismissal for lack of standing was the only final, appealable order before the Court of Appeals. The other orders appealed by plaintiffs were interlocutory and not appealable absent the district court's Order and Judgment dismissing for lack of standing.[1] Similarly, the issues presented by defendants' cross-appeal were all interlocutory in nature and not appealable absent plaintiffs' appeal of their dismissal for lack of standing.[2] Therefore, the Court of Appeals no longer has

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[1] By Order dated April 14, 1993, the district court denied plaintiffs' motion for class certification, and held that plaintiffs' action could only proceed derivatively on behalf of the Plan. In its April 14, 1993 Order, the district court also dismissed named plaintiffs Kayes, G. Kennedy, Lacy, Maurer, and L. Reynolds as "inadequate" representatives of the Plan. In addition, the Order of April 14, 1993 required plaintiffs' counsel to completely withdraw from further legal representation of an organization the [sic] called "PL Rescue Fund." By Order dated May 17, 1993, the district court granted summary judgment for defendants on plaintiffs' prohibited transaction claims. Finally, by Order dated August 26, 1992, the district court denied plaintiffs' motion for an award of interim attorneys' fees pursuant to ERISA § 502(g).

[2] The defendants cross-appealed the district court's orders holding that the McCarran-Ferguson Act does not preclude the construction of ERISA's fiduciary provisions so as to impose liability upon a plan fiduciary for the selection of a state-licensed insurance company as a plan termination annuity pro-

jurisdiction regarding the remaining issues on appeal. (*See, United States v. Stanley,* 107 S.Ct. 3054 (1987) (no pendent appellate jurisdiction exits to review orders other than those certified under 28 U.S.C.A. 1292(b).)

Accordingly, plaintiffs respectfully request that the district court's standing order be vacated and that this action be remanded with appropriate instructions. Plaintiffs' respectfully submit herewith a proposed order for the Court's consideration.

Yours truly,

SIGMAN & LEWIS

By /s/ Alfred H. Sigman
Alfred H. Sigman

Attorneys for
Plaintiffs/Appellants

Enclosures: Five copies of letter
and [Proposed] Order

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vider, finding that defendants Hurwitz and Leone were Plan fiduciaries under ERISA, and denying partial summary judgment for defendants Hurwitz, Leone, Schwartz, and Iaco on the grounds that defendant Pacific Lumber Company, as the Plan's named fiduciary, had made the decision to select the Executive Life Insurance Company as the annuity provider for the terminated Plan.

103D CONGRESS
1ST SESSION

S. 1312

To amend the Employee Retirement Income Security Act of 1974 in order to provide for the availability of remedies for certain former pension plan participants and beneficiaries.

IN THE SENATE OF THE UNITED STATES

JULY 29 (legislative day, JUNE 30), 1993

Mr. METZENBAUM (for himself and MRS. KASSEBAUM) introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources.

A BILL

To amend the Employee Retirement Income Security Act of 1974 in order to provide for the availability of remedies for certain former pension plan participants and beneficiaries.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Pension Annuitants Protection Act of 1993".

SEC. 2. CIVIL ENFORCEMENT OF ERISA.

Section 502(a) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1132(a)) is amended –

(1) by striking the semicolon at the end of paragraph (5),

(2) by striking the period at the end of paragraph (6) and inserting "; or", and

(3) by adding at the end of the following new paragraph:

"(7)(A) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.".

SEC. 3. WAIVER OR REDUCTION OF CIVIL PENALTY.

Section 502(1)(3)(B) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1132(1)(3)(B)) is amended by inserting "(or to provide the relief ordered

pursuant to subsection (a)(7))" after "to restore all losses to the plan".

SEC. 4. EFFECT ON OTHER PROVISIONS.

Nothing in this Act shall be construed to limit the legal standing of individuals to bring a civil action as participants or beneficiaries under section 502(a) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1132(a)), and nothing in this Act, other than the relief authorized in section 2 of this Act, shall affect the responsibilities, obligations, or duties imposed upon fiduciaries by title I of the Employee Retirement Income Security Act of 1974.

SEC. 5. EFFECTIVE DATE.

The amendments made by this Act shall apply to any legal proceeding pending, or brought, on or after May 31, 1993.

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November 1, 1994

VIA HAND DELIVERY

Clerk, Ninth Circuit Court of Appeals
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P.O. Box 193846
San Francisco, California 94119

Re: *Miller, et al. v. Pacific Lumber Co. et al.*, Nos. 93-16271 & 93-16575.

To the Clerk of the Ninth Circuit Court of Appeals:

Respondents/cross-appellants in the above-captioned appeal hereby respond to appellants' October 26, 1994 letter informing the Court of the recent enactment of the Pension Annuitants Protection Act of 1994 ("PAPA"). For the reasons set forth below, appellants' argument that PAPA moots this appeal is incorrect. Nothing in PAPA

eliminates the case or controversy in this appeal or prevents this Court from finally deciding the issues properly before it on appeal and cross-appeal.

PAPA has not rendered either this appeal and cross-appeal or the district court's order moot. "A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). A court will find that a change in the law will cause a case to become moot if, as a result of the change, the appellant no longer has a "specific, live grievance." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 479 (1990) (change in federal law rendered constitutional challenge to state laws moot). For example, a change in the law will render a case moot where the statute or the challenged provisions are repealed or amended to eliminate the live controversy during the pendency of the case. *See, e.g., Train v. City of New York*, 420 U.S. 35 (1975); *United States v. New Jersey State Lottery Commission*, 420 U.S. 371 (1975); *Kremens v. Bartley*, 431 U.S. 119 (1977).

The facts of this case simply fail to comport with those required for mootness. Neither party has challenged the applicability of 29 U.S.C. Section 1132(a), on constitutional grounds or otherwise. The issue, in the District Court and now on appeal, is not whether Section 1132(a) applies but how. Nor has the passage of PAPA eliminated any "specific live grievance" of appellants. At most, PAPA may affect the *result* of the appellate court's decision; it does not eliminate the controversy.

Appellants' allegation that the enactment of PAPA divests this Court of jurisdiction over the appeal and

cross-appeal also is incorrect. The Court may decide cross-appeals from an earlier order denying a summary judgment motion when reviewing a direct appeal of a final order that was favorable to the cross-appellants. *Hilton v. Mumaw*, 522 F.2d 588, 603 (9th Cir. 1975), *citing Peoria and Pekin Union Ry. v. United States*, 263 U.S. 528, 535-36 (1924), ("an otherwise nonfinal order may become cross-appealable upon the entry of a final order" when there is a risk that the cross-appellants might become aggrieved upon denial of the direct appeal). Appellants' reliance upon *United States v. Stanley*, 107 S.Ct. 3054 (1987), is misplaced. *Stanley* is limited to appeals from interlocutory orders certified pursuant to 28 U.S.C.A. 1292(b). This case involves the appeal of a final order and, therefore, the limitations on cross-appeals set forth in *Stanley* do not apply.

Furthermore, applying PAPA retroactively to the appeal and cross-appeal raises due process and equal protection concerns. Congress may amend a statute to allow for retroactive application provided that the amendment and its retroactive provisions are rationally related to a legitimate government end. *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1573 (9th Cir. 1993). In this case, an action on behalf of private plaintiffs is not the "only means available" to redress the alleged fiduciary breaches. Appellees' Reply Brief at 8. The Secretary has the power to bring an enforcement action and, in fact, has an enforcement action pending. *Id.* Applying PAPA retroactively to permit private plaintiffs to have standing to sue, therefore, does not further any government interest not already provided for, nor is it rationally related to the

legitimate goal of enforcing ERISA. In fact, as the legislative history of PAPA makes clear, the statute was explicitly aimed at changing the result in this case to allow private plaintiffs standing on the theory that their standing was necessary to enforce ERISA, notwithstanding the pendency of the Secretary's identical action.

Finally, the enactment of PAPA does not, as appellants argue, require this Court to defer to the District Court by dismissing the appeal without ruling on any aspects thereof. This Court has several options available that would not involve the inefficient use of judicial resources suggested by appellants.[1] Because this court properly has jurisdiction and has already developed the necessary record, it may finally decide all of the issues on appeal, recognizing the enactment of PAPA, or it may reopen the record for the limited purpose of allowing parties an opportunity to submit additional briefs regarding the impact of PAPA.

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[1] While appellants' letter may have been the proper procedure for drawing new authority to the Court's attention under Fed.R.App.P. Rule 28j, it was clearly not the proper procedure in any event for arguing that enactment of PAPA requires the District Court to reconsider its decision prior to action by the appellate court. Once on appeal, the proper procedure would have been to ask the District Court whether it wished to entertain a motion for relief from judgment pursuant to Fed.R.Civ.P. 60(b) and then to move this Court, if the District Court so indicated, for a remand. *Gould v. Mut. Life, Ins. Co. of New York*, 790 F.2d 769, 772 (9th Cir. 1986). Not having pursued this option in the District Court, appellants now must leave resolution of their appeal and respondents' cross-appeal to this Court.

For the reasons set forth above, respondents/cross-appellants respectfully request that the Court deny appellants request and proceed to issue its final opinion, or in the alternative order additional briefing on the effect of PAPA and then proceed to issue its final opinion.

Respectfully submitted,

/s/ Kathleen V. Fisher
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cc: Alfred Sigman
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARENCE KAYES, et al., Plaintiffs/Appellants/ Cross-Appellees, vs. PACIFIC LUMBER COMPANY, et al., Defendants/Appellees/ Cross-Appellants.	No. 93-16271, 93-16575 [Appeal from Judgment of the United States District Court for the Northern District of California, DC No. C-89-3500 (SBA)] **APPLICATION TO FILE AMENDMENT TO PETITION FOR REHEARING; DECLARATION OF KATHLEEN V. FISHER; EXHIBIT**

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I. INTRODUCTION

Defendants/Appellees/Cross-Appellants ("Applicants") seek leave to file an amendment to their Petition for Rehearing to raise a recently discovered issue of subject matter jurisdiction and statutory interpretation overlooked both by undersigned counsel in the Petition for Rehearing previously filed and by this Court in its Opinion: Does section 502(a)(9) of the Employee Retirement Income Security Act of 1974 ("ERISA") (amended October 22, 1994, after briefing and argument in this appeal), 29 U.S.C. § 1132(a)(9) provide former participants or beneficiaries of terminated pension plans standing (1) to seek any relief other than that necessary to assure receipt of amounts to be provided by an insurance contract or annuity purchased in connection with the termination of their participant/beneficiary status; or (2) to bring a claim asserting any cause of action other than one alleging that the purchase of the insurance contract/annuity constituted a breach of fiduciary duty.

In its Opinion the panel determined that section 502(a)(9) gives former participants or beneficiaries standing "to assure receipt by the participant or beneficiary of the amounts provided or to be provided" by an insurance contract or insurance annuity purchased after the termination of a pension plan. This standing, however, does not give rise to all of the causes of action brought, or all of the remedies sought, by plaintiffs/appellants/cross-appellees ("Plaintiffs") herein. For example, Plaintiffs' claims under sections 406(a) or (b) arising from any prohibited transactions that allegedly occurred are not claims "to assure receipt by the participant or beneficiary of the amounts provided or to be provided" by an insurance

contract or insurance annuity purchased after the termination of a pension plan. Similarly, section 502(a)(9) does not give former participants or beneficiaries standing to assert claims under sections 502(a)(2) or (3), the sections under which Plaintiffs originally brought the underlying action.

Standing is a question of subject matter jurisdiction (*Warth v. Seldin*, 422 U.S. 490, 498-500 (1975); *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406, 1410 (9th Cir. 1988) (*citing Warth*)), and cannot be waived. *FW/PBS Inc. v. City of Dallas*, 493 U.S. 215, 230-231 (1990) ("federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines' " (citations omitted); *Shabazz v. Carroll*, 833 F.2d 149, 149 (9th Cir. 1987), *cert. denied*, 487, U.S. 1207 (1988) (jurisdictional issues raised in petition for rehearing); *Fiester v. Turner*, 738 F.2d 1474, 1475 (9th Cir. 1986) ("Jurisdiction over an appeal is open to challenge at any time."). Even after the addition of subsection (9) to section 502(a), neither this Court nor the District Court has subject matter jurisdiction over all of the claims raised and relief sought by plaintiffs. Hence, it is appropriate that this Court rehear this appeal to consider, as a matter of law, which claims can be brought and what relief can be sought by plaintiffs under ERISA § 502(a)(9). Applicants respectfully request that the panel grant this application so that these issues can be put before the Court in the Petition for Rehearing.

II. STATEMENT OF FACTS

On April 26, 1993, Plaintiffs filed their Third Amended Complaint for Declaratory and Injunctive Relief. In that Complaint, Plaintiffs sought declaratory judgment that Applicants were plan fiduciaries, that they had breached their fiduciary duties, and that they had engaged in prohibited transactions. They also sought orders compelling Maxxam to purchase new annuities and creating a constructive trust over any profits derived from the alleged ERISA violations. (Third Amended Complaint, Prayer, pp. 22-24). On May 17, 1993, the District Court determined that plaintiffs, as former participants or beneficiaries of the Plan, lacked standing to sue for any of their claims. The District Court affirmed its decision on July 17, 1993 (following Plaintiffs' motion for reconsideration), and Plaintiffs subsequently filed their appeal. (Op., pp. 3988-3999.)

On October 22, 1994, after all briefs and oral argument on appeal, Congress passed the Pension Annuitants Protection Act of 1994 ("PAPA"), which amended section 502(a) by adding subsection (9). (Op., pp. 3990-3991; Declaration of Kathleen V. Fisher, p. 7, ¶ 2 ("Fisher decl.").) Section 502(a)(9) provides in full as follows:

> (a) A Civil action may be brought . . .
>
> (9) in the event that the purchase of an insurance contract or insurance annuity in connection with the termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, by any individual who

> was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

On April 10, 1995 this panel filed its Opinion, without benefit of any briefing or argument by Applicants concerning the effect of section 502(a)(9) on the underlying action or the issues raised on appeal. (Fisher decl., p. 7, ¶ 2.) In section II.A of that Opinion, this panel concluded that Plaintiffs had standing to sue under section 502(a)(9) but did not discuss which of Plaintiff's claims could be brought under that new section. (Op., pp. 3989-3992.) Applicants filed a timely Petition for Rehearing, in which, given the short time presented to review the Opinion and file the Petition, Applicants, like the panel before them, failed to realize that the relief permitted under section 502(a)(9) was much more limited than that sought by Plaintiffs. (Fisher decl., pp. 7-8, ¶ 3.) On May 17, 1995, Applicants discovered the error made both by the panel and themselves, and determined to file this application as soon as practicable. (Fisher decl., p. 8, ¶ 4.)

III. NATURE OF THE ERROR

Section 502(a)(9) provides, in pertinent part, that:

> A Civil action may be brought . . . in the event that the purchase of an insurance contract or insurance annuity . . . constitutes a violation of part 4 [fiduciary duties] of this title or the terms

> of the plan . . . by any individual who was a participant or beneficiary at the time of the alleged violation . . . to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity. . . .

By its terms, section 502(a)(9) does not give rise to a cause of action unless an alleged breach occurs because the purchase of an annuity or insurance policy is a violation of fiduciary duties. Thus, because the use of residual assets as collateral for the bridge loan after termination of the plan was not a "purchase of an insurance contract or insurance annuity," it could not trigger section (a)(9). Similarly, section 502(a)(9) does not provide standing to former participants/beneficiaries to the extent they seek relief (in connection with the purchase of an insurance annuity that allegedly constituted a breach of fiduciary duty) other than that necessary "to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity. . . . "[1]

Here, Plaintiffs assert in the First, Second and Third Claims for Relief of the Third Amended Complaint that the purchase of the annuities upon the termination of the Plan was a violation of the Applicants' fiduciary duties. Thus, those claims state a cause of action under section (a)(9) as the panel interprets it: Plaintiffs have met the condition precedent – the purchase of an annuity or insurance policy – and they can sue to assure that each of them receives the amounts provided or to be provided by

---

[1] In ERISA litigation, standing questions are controlled by the relief sought. *Murdock, supra,* 861 F.2d at 1410.

such annuities. But to the extent that Plaintiffs seek other remedies in connection with those claims, such as their requests for declaratory relief and the imposition of a constructive trust "for the benefit of the Plan's participants . . . over any profits . . . defendants improperly obtained through their breaches of fiduciary duty or prohibited transactions" (Third Amended Complaint, Prayer, ¶ "L," pp. 23-24), Plaintiffs lack standing to bring such claims and this Court lacks subject matter jurisdiction to hear them.

Plaintiffs also lack standing to bring their Fourth, Fifth and Sixth Claims for Relief. In those causes of action, Plaintiffs assert that Applicants breached their fiduciary duties by pledging alleged Plan assets as collateral for certain bridge loans and engaged in prohibited transactions by their use of the residual assets. However, since the use of residual assets for collateral and other purposes has nothing to do with the purchase of insurance annuities, those claims do not fall within the scope of section (a)(9) and Plaintiffs therefore have no standing to raise such claims or request relief for such alleged transactions. This lack of standing deprives the District Court and this Court of subject matter jurisdiction under ERISA over Plaintiffs' prohibited transaction claims. *See, e.g., Warth, supra,* 422 U.S. at 498-500; *Murdock, supra,* 861 F.2d at 1410. Thus, Applicants seek an amendment to their Petition for Rehearing so that the Court may rule, as a matter of law, which causes of action brought and relief sought by Plaintiffs trigger ERISA (or any other) subject matter jurisdiction.

IV. CONCLUSION

Because section 502(a)(9) only permits former participants or beneficiaries of a pension plan to bring an action under part 4 of ERISA where the purchase of an annuity or insurance policy allegedly constituted a breach of fiduciary duty, does not permit an action where an alleged breach of fiduciary duty arose out of other transactions, and only permits limited forms of relief, a rehearing regarding Plaintiffs' standing and the Court's jurisdiction is appropriate. Thus, defendants/appellees/cross-appellants, The Pacific Lumber Co., Maxxam Inc., Maxxam Group Inc., Charles Hurwitz, William Leone, Paul Schwartz and James Iaco, respectfully request that the panel grant this application for leave to file an amendment to their Petition for Rehearing, attached hereto as Exhibit "A."

DATED: May 19, 1995

Respectfully submitted,

MORRISON & FOERSTER

By /s/ Shirley M. Hufstedler
Shirley M. Hufstedler
Attorneys for Defendants/Appellees/Cross-Appellants The Pacific Lumber Co., Maxxam Inc., Maxxam Group Inc., Charles Hurwitz, William Leone, Paul Schwartz and James Iaco

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARENCE KAYES, et al., Plaintiffs/Appellants/ Cross-Appellees, vs. PACIFIC LUMBER COMPANY, et al., Defendants/Appellees/ Cross-Appellants.	No. 93-16271, 93-16575 [Appeal from Judgment of the United States District Court for the Northern District of California, DC No. C-89-3500 (SBA)] **DECLARATION OF KATHLEEN V. FISHER IN SUPPORT OF APPLICATION TO FILE AMENDMENT TO PETITION FOR REHEARING**

I, Kathleen V. Fisher, state and declare as follows:

1. I am a member of the firm of Morrison & Foerster, counsel for defendants/appellees/cross-appellants ("Applicants") herein, and have been involved in the prosecution of this appeal and the Petition for Rehearing thereof. Based on that involvement with this matter, I have personal knowledge of the facts set forth below.

2. While the appeal was before the Ninth Circuit, but after the briefing and argument had been completed, Congress passed the Pension Annuitants Protection Act of 1994 ("PAPA"). In response to Plaintiffs' October 26,

1994 letter informing the Court about the passage of PAPA, on November 1, 1994, Applicants submitted correspondence to the Court wherein they offered to provide briefing on the effect of PAPA. The Court did not request or permit such briefing before it filed its April 10, 1995 Opinion.

3. On April 24, 1995, Applicants filed their Petition For Rehearing. Given the short time presented to review the Opinion and file the Petition, Counsel for Applicants failed to note the limited scope of relief afforded by ERISA section 502(a)(9), 29 U.S.C. section 1132(a)(9) and the effect on this Court's jurisdiction. Applicants therefore did not include the standing and jurisdiction issues relating to, section 502(a)(9) as a ground supporting their Petition for Rehearing.

4. On May 17, 1995, counsel for Applicants reviewed the Opinion of the Court and section 502(a)(9), and concluded that section (a)(9) did not provide Plaintiffs with standing to bring any claim other than one alleging that the purchase of an insurance annuity constituted a violation of fiduciary duties, or seek any relief other than that necessary to assure that the former plan participants or beneficiaries received the amounts provided or to be provided by such insurance annuity.

Executed under penalty of perjury at San Francisco, California, on this 19th day of May, 1995.

/s/ Kathleen V. Fisher
Kathleen V. Fisher

No. 93-16271, 93-16575

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARENCE KAYES, et al.,

Plaintiffs/Appellants/Cross-Appellees,

vs.

PACIFIC LUMBER COMPANY, et al.,

Defendants/Appellees/Cross-Appellants.

Appeal from Judgment of the United States District Court for the Northern District of California
DC No. C-89-3500 (SBA)

PLAINTIFFS/APPELLANTS/CROSS-APPELLEES' OBJECTION TO DEFENDANTS/APPELLEES/ CROSS-APPELLANTS' APPLICATION TO AMEND PETITION FOR REHEARING

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PLAINTIFFS/APPELLANTS/CROSS-APPELLEES' OBJECTION TO DEFENDANTS/APPELLEES/ CROSS-APPELLANTS' APPLICATION TO AMEND PETITION FOR REHEARING

Plaintiffs/appellants/cross-appellees ("Plaintiffs") hereby object to Defendants' Application of May 19, 1995 to "amend" their Petition For Rehearing filed on April 24, 1995. In fact, Defendants' proposed self-styled "amendment" sets forth a new and untimely second petition for rehearing. Defendants state no compelling reason why the Court should accept their tardy second petition for rehearing. "Counsel should not request extensions of time [to file a petition for rehearing] *except for the most compelling of reasons.*" (Para. (1) Circuit Advisory Committee Note To Rules 35-1 to 35-3; emphasis added.) Absent any such showing, the Court should deny Defendants' Application.

In the alternative, Plaintiffs ask the Court to clarify its Order of May 24, 1995 directing Plaintiffs to file a response to Defendants' original petition for rehearing. This Order does not refer to Defendants' self-styled "amendment", and Plaintiffs do not know whether or not their response should address Defendants' *de facto* second petition for rehearing, which belatedly raises a new issue wholly unrelated to the issue posed in Defendants' original petition.

Fed.R.App.P. 40(a) limits the filing of a petition for rehearing to 14 days after the entry of the appellate court's judgment. Defendants' Petition For Rehearing, filed within that period, seeks rehearing of a single issue related to Part II E of the Panel's opinion. Defendants' Application – submitted 39 days after filing of the Panel's

opinion – seeks a rehearing on wholly separate and allegedly "recently discovered" issues related to Part II A of the Panel's opinion (concerning the jurisdictional and remedial scope of ERISA § 502(a)(9)).

Conspicuously absent from Defendants' Application is any "showing of diligence and substantial need", as required by Circuit Rule 31-2.2(b). Defendants' only explanation for their untimely Application is "the short time presented to review the Opinion and file the Petition", Application p. 4, Declaration of Kathleen V. Fisher ("Fisher Decl."), submitted with Defendants' Application, ¶ 3. Yet, "[a] conclusory statement as to the press of business does not constitute a showing of diligence and substantial need." Circuit Rule 31-2.2(b).

Congress added Section 502(a)(9) to ERISA on October 22, 1994. Counsel for Defendants had ample opportunity to consider the scope of that provision prior to May 17, 1995. See Fisher Decl. ¶ 4. Defendants incorrectly contend that the Panel filed its opinion "without benefit of any briefing or argument by Applicants concerning the effect of section 502(a)(9) on the underlying action or the issues raised on appeal". (Application p. 4, Fisher Decl. ¶ 2.) By letter dated October 26, 1994, counsel for Plaintiffs informed the Court of Congress' enactment of Section 502(a)(9) and its impact on this case. Ms. Fisher responded by letter to the Court dated November 1, 1994. The issue Defendants now belatedly raise in their *de facto* second petition for rehearing can only be described as inextricably linked to those discussed in Ms. Fisher's letter to the Court of November 1, 1994. Defendants' numerous attorneys – all experienced lawyers from major firms – must be assumed to have thought of, but rejected,

the argument they now assert in their *de facto* second petition.

If the Court does grant Defendants' Applicant To Amend, then Plaintiffs request an opportunity to submit additional briefing on the issues raised therein.

Date: May 26, 1995 Respectfully submitted,

SIGMAN, LEWIS & FEINBERG

By /s/ Peter W. Saltzman
Peter W. Saltzman

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARENCE KAYES; GENE KENNEDY; SHARON KENNEDY; WILEY LACY; JOHN R. MAURER; LESTER REYNOLDS; SHIRLEY REYNOLDS; HOLLIS ROLLINS; DONALD FILBY; JACK MILLER; JAMES LOVELL; PAUL S. BRADY; WILFRED A. BLAIN; LLOYD S. TUCKER; DONALD J. SCHOENHOFER, Plaintiffs – Appellants, v. PACIFIC LUMBER COMPANY; MAXXAM GROUP, INC., MAXXAM, INC.; CHARLES HURWITZ; PAUL N. SCHWARTZ; JAMES IACO; WILLIAM LEONE, Defendants – Appellees.	No. 93-16271
UNITED STATES SECRETARY OF LABOR, amicus; AMERICAN ASSOCIATION OF RETIRED PERSONS (AARP), amicus, Amicus Curiae.	
CLARENCE KAYES; GENE KENNEDY; SHARON KENNEDY; WILEY LACY; JOHN R. MAURER;	No. 93-16575 DC# CV-89-03500-SBA

LESTER REYNOLDS; SHIRLEY REYNOLDS; HOLLIS ROLLINS; DONALD FILBY; JACK MILLER; JAMES LOVELL; PAUL S. BRADY; WILFRED A. BLAIN; LLOYD S. TUCKER,	)	Northern District of California
Plaintiffs – Appellees,	)	ORDER
v.	)	(Filed Jun. 7, 1995)
PACIFIC LUMBER COMPANY; MAXXAM GROUP, INC., MAXXAM, INC.; CHARLES HURWITZ; PAUL N. SCHWARTZ; JAMES IACO; WILLIAM LEONE,	)	
Defendants – Appellants.	)	
UNITED STATES SECRETARY OF LABOR, amicus,	)	
Amicus Curiae.	)	

Before: CHOY, POOLE and REINHARDT, Circuit Judges.

Defendants/Appellees/Cross-Appellants' Application to File Amendment to Petition for Rehearing is DENIED.

Plaintiffs/Appellants/Cross-Appellees shall file a response to the original Petition for Rehearing, as was previously directed by this court, within 14 days from the date this order is filed.

Supreme Court, U.S.
FILED
SEP 27 1995
CLERK

No. 95-220

IN THE

Supreme Court of the United States

October Term, 1995

THE PACIFIC LUMBER COMPANY; MAXXAM GROUP, INC.; MAXXAM INC.; CHARLES HURWITZ; PAUL N. SCHWARTZ; JAMES IACO; WILLIAM LEONE,
Petitioners,

vs.

CLARENCE KAYES; GENE KENNEDY; SHARON KENNEDY; WILEY LACY; JOHN R. MAURER; LESTER REYNOLDS; SHIRLEY REYNOLDS; HOLLIS ROLLINS; DONALD FILBY; JACK MILLER; JAMES LOVELL; PAUL S. BRADY; WILFRED A. BLAIN; LLOYD S. TUCKER; DONALD J. SCHOENHOFER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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INTRODUCTION[1]

Respondents seek to divert the Court's attention from the importance and ripeness of the questions presented by arguing that the questions are not properly presented by the record below and that, even if they were, they will not recur. Respondents are mistaken.

A. The Ninth Circuit's Erroneous Assumption Of Jurisdiction Over Respondents' Prohibited Transaction Claim Could Not Be Waived

Respondents argue that the Ninth Circuit did not decide whether respondents had standing to assert their prohibited transaction claim and hence whether the court had subject matter jurisdiction to entertain their appeal from summary judgment on that claim.[2] If respondents are right, the Ninth Circuit disobeyed this Court's requirement that federal courts *must* decide their own jurisdiction even if the parties have not raised the question, because subject matter jurisdiction cannot be waived either by the parties or by a federal court. *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 230-31, 110 S. Ct. 596, 607-08, 107 L. Ed. 2d 603, 621-22 (1990). Respondents, not petitioners, had the burden of establishing facts upon which subject matter jurisdiction depended, *id.* at 231, and they did not do so.

---

[1] Pursuant to Rule 29.1, petitioners state that the statement of corporate affiliation set forth in footnote one of The Petition For A Writ Of Certiorari filed in this matter is accurate, and by this reference incorporate that statement herein.

[2] If respondents were correct that the lower court did not decide its own jurisdiction, it necessarily follows that the court's discussion of the prohibited transaction issue is *dicta* and that the district court on remand would not be foreclosed by the law of the case doctrine to decide its own jurisdiction and, if jurisdiction were determined to exist, to decide the merits *de novo.*

Congress narrowly circumscribed federal jurisdiction to decide ERISA cases by defining those persons who are authorized to bring suit, the subject matter of such suits, and the relief that federal courts are permitted to give. This Court has been explicit that federal courts are not permitted to expand their jurisdictional reach by broadening the definition of persons who are entitled to bring such actions, by extending the remedies that are available under the statute, or by inferring claims for relief that Congress has not specifically authorized. *E.g., Mertens v. Hewitt Assocs.*, 508 U.S. ____, 113 S. Ct. 2063, 2068 n.5, 124 L. Ed. 2d 161, 169 n.5 (1993) (the question is "whether the statute affirmatively *authorizes* such a suit" [emphasis in original]); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117, 109 S. Ct. 948, 958, 103 L. Ed. 2d 80, 97 (1989) ("To say that a 'participant' is any person who claims to be one begs the question . . . and renders the definition set forth in § 1002(7) superfluous."); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985).

Before enactment of the Pension Annuitants Protection Act of 1994 ("PAPA"), Pub. L. No. 103-401 (Oct. 22, 1994), former beneficiaries or participants of terminated plans were held to be without standing to maintain ERISA claims because they were neither "participants" nor "beneficiaries" of a plan within the meaning of the statute. *E.g., Firestone Tire*, 489 U.S. at 117-18 (to be a "participant" within the meaning of ERISA, employees who are not in currently covered employment must have a "colorable claim" that they may become eligible for benefits in the future); *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1532-36 (10th Cir.), *cert. denied*, 114 S. Ct. 81, 126 L. Ed. 2d 49 (1993); *Winchester v. Pension Comm. of Michael Reese Health Plan, Inc.*, 942 F.2d 1190, 1192-93 (7th Cir. 1991); *Teagardener v. Republic-Franklin, Inc., Pension Plan*, 909 F.2d 947, 952-54 (6th Cir. 1990), *cert. denied*,

498 U.S. 1027, 111 S. Ct. 678, 112 L. Ed. 2d 670 (1991);[3] *Kuntz v. Reese,* 785 F.2d 1410, 1411 (9th Cir.) (per curiam), *cert. denied,* 479 U.S. 916, 107 S. Ct. 318, 93 L. Ed. 2d 291 (1986); *Yancy v. American Petrofina, Inc.,* 768 F.2d 707, 708 (5th Cir. 1985); *Saladino v. ILGWU Nat'l Retirement Fund,* 754 F.2d 473, 476 (2nd Cir. 1985).

PAPA extended standing only to former participants or beneficiaries of a terminated plan and only to seek assurance that they would receive full benefits from an insurance contract purchased by the plan sponsor to pay the benefits of the terminated plan. Respondents' prohibited transaction claim attacking Pacific Lumber's pledge of its future interest in a potential reversion of surplus assets after plan termination is not a suit for benefits within the meaning of PAPA nor within the meaning of ERISA before PAPA was enacted.[4]

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[3]Since its decision in *Teagardener,* the Sixth Circuit has created its own exception to the rule that only "participants" have standing to sue under ERISA section 502(a). *See Swinney v. General Motors,* 46 F.3d 512, 518-19 (6th Cir. 1995). *Swinney,* relied upon by respondents, held that a fiduciary cannot "defeat an employee's standing to bring an ERISA action by duping him into giving up his right to participate in a plan. ERISA should not be construed to permit the fiduciary to circumvent his ERISA-imposed fiduciary duty in this manner." *Id.* The "but-for" standing test articulated by the Sixth Circuit in *Swinney* has been applied in the First, Second and Fifth Circuits, albeit with varying factual requirements to meet the "but-for" link, but it has been rejected by the Fourth, Ninth and Tenth Circuits. *See id.* and cases cited therein.

The *Swinney* rule is inapplicable to respondents' claims because there is no allegation (nor could there be) that termination of the Pacific Lumber plan, which ended respondents' participant status, was a breach of fiduciary duty. Even if *Swinney* were applicable, it is yet another example of a sharply defined, acknowledged split among the circuits and would only provide further reason for the Court to grant the Petition.

[4]Respondents' reliance on statements from the floor of the House as legislative history of PAPA, Opp. Brief at 9-10, is misplaced. Unless the language of a statute is shown to be ambiguous, the Court has eschewed

Respondents' contention that the jurisdictional question presented will not recur because Congress has amended the tax law to impose heavy excise taxes on reversions of surplus assets to corporate plan sponsors after a plan has terminated is simply wrong.[5] The unarticulated premise is that the Ninth Circuit's decision applies *only* when the sponsor of a plan pledges its future interest in connection with a corporate takeover. However, the court's rationale cannot be thus limited because the magic that retroactively turned Pacific Lumber's asset into an asset of the Plan was Pacific Lumber's intention to use its own asset in a way that did not benefit the Plan. Under the Ninth Circuit's analysis, a pledge of a plan sponsor's future interest in the reversion becomes a plan asset whether that asset is pledged to refinance a company's existing debt, to build a new plant, or to do any other act that does not benefit the plan. The statutory availability of legal fees in ERISA provides sufficient incentive to lawyers for beneficiaries or former beneficiaries of ERISA plans to challenge any use that a plan

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reference to legislative history. If the legislative history must be consulted, "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill," not statements by individual members. *Garcia v. United States*, 469 U.S. 70, 76, 105 S. Ct. 479, 483, 83 L. Ed. 2d 472, 478 (1984).

[5] Indeed, respondents factual assertions about the nature of the tax — supposedly potentially "50 percent" — are wrong as well. As respondents deign to explain in a cryptic footnote, an excise tax of 10% was already in place when Pacific Lumber terminated its plan. The tax was increased in 1988 to its current level of 20% for termination/restart transactions like the Pacific Lumber termination. *See* Internal Revenue Code § 4980, enacted effective January 1, 1986 by the Tax Reform Act of 1986, Pub. L. No. 99-514, *amended by* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508. Moreover, the budget bill currently pending before Congress would remove the excise tax altogether for the next five years, in order to free up surplus assets for use by corporate sponsors. Revenue Reconciliation Act of 1995, Subtitle F, § 13607, approved by House Ways & Means Committee Sept. 19, 1995.

sponsor may have made or intended to make of its future reversionary interest in excess ERISA plan assets. While there have been instances in which ERISA plans have been underfunded, it is no secret that billions of dollars of surplus exists in many others. It cannot reasonably be doubted that the Ninth Circuit's decision, if uncorrected, will generate even more ERISA litigation.

B. A Sponsor's Future Interest In Surplus Assets, If Any, Of A Terminated Plan Is Not A Plan Asset And Cannot Be Used To Change A Legitimate Use Into A Prohibited Transaction

Respondents' arguments wrongly assume that Congress designed ERISA's fiduciary provisions to be a prophylactic against corporate takeovers, friendly or otherwise. The purpose in enacting ERISA was to provide reasonable assurance to beneficiaries of ERISA plans that their vested retirement benefits will be paid. Nothing in the legislative history of the prohibited transaction rules remotely suggests that the drafters were concerned about corporate takeovers or were attempting to discourage such takeovers through ERISA. *See H.R. Rep. No. 533,* 93rd Cong., 2d Sess. (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4651, 4655; *S. Rep. No. 127,* 93rd Cong., 2d Sess. (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4866-69.

Respondents' reliance on *Commissioner v. Keystone Consol. Indus.,* 508 U.S. ____, 113 S. Ct. 2006, 124 L. Ed. 2d 71 (1993) is misplaced. That was a tax case in which this Court observed that Congress intended to bar a transaction that was likely to injure a pension plan. In this case, however, as the lower court recognized, the pledge of the sponsor's future interest was designed so that by definition it could not injure the Plan because the pledgee would not "be able in any way to reach [P]lan assets." App. 36.

Respondents' citation of *John Hancock Ins. Co. v. Harris Trust & Sav. Bank,* 114 S. Ct. 517, 126 L. Ed. 2d 524 (1993), for the proposition that "this Court has adopted a broad definition of 'plan assets'," Opp. Brief at 13, similarly misses the mark. In *Harris Trust,* the Court considered whether insurance companies managing pension plan assets under "general account contracts" fit within a statutory exemption to the rule that anyone who manages plan assets is an ERISA fiduciary. *See* ERISA § 401(b)(2), 29 U.S.C. § 1101(b)(2). The *Harris Trust* Court did not, as respondents assert, base its analysis on a holding that the term "plan assets" should be broadly construed. Rather, after noting that the term "plan assets" is not defined in ERISA, this Court held that Congress had clearly intended the statutory exemption at issue to be construed narrowly (all parties agreed that if the exemption did not apply the assets were plan assets). *Harris Trust,* 114 S. Ct. at 524-25.

Respondents' argument that Pacific Lumber's future interest was a Plan asset when the pledge of that asset was given to the lender is based on a serious misconception of the law of future interests. A future interest is a present asset of its owner, but the future interest does not become a present interest in the property until interests precedent have ended. Restatement of Property § 153, cmt. (e) (1936). To use a familiar analogy, a daughter who will receive the reversion in the family home in which her parents have retained a life estate has a future interest in that property; she can pledge her interest as collateral to secure a loan for her own benefit. Although the present value of her future interest may be difficult to determine, it cannot be doubted that it is she, not her parents, who owns the reversion.

The same is true here. The Plan could never have owned either a future interest in the reversion or the reversion itself. There would be *no* reversion if the Plan owned it because

the present and future interests would merge, extinguishing the future interest. The reversion does not "fall in" until all liabilities of the Plan have been discharged and the Plan is dead.

Congress in ERISA could have forbidden a plan sponsor from making any use of its future interest in surplus plan assets, but it did not do so. Section 406 is explicit that a transaction cannot be a prohibited transaction unless it involves some kind of dealing with the "assets of the plan." Because the Plan never owned the future interest, Pacific Lumber's pledge of its asset could not constitute a prohibited transaction unless the Ninth Circuit was free to rewrite both the statute itself and settled property law. The federal courts are not permitted to revise ERISA, particularly if their purpose is to attempt to give protection to pensioners that Congress did not believe necessary. *Mertens,* 113 S. Ct. at 2071-72.

C. ERISA's Functional Definition Of Plan Fiduciaries Is Not A Substitute For Evidence That Petitioners Acted As Plan Fiduciaries

Respondents argue the fiduciary status point as if petitioners were contending that persons who are officers or directors of a plan sponsor cannot also be fiduciaries of a plan. Of course they can — if there is substantial evidence that they went sufficiently beyond their duties as directors or officers so as to exercise personal control and authority over a plan. Such evidence was not produced here. The question whether petitioners Hurwitz and Leone became Plan fiduciaries by virtue of their individual actions was never tried. The only evidence on the question was submitted in support of respondents' motion for summary judgment that these two petitioners were Plan fiduciaries. The district court granted summary judgment on the ground that they were Plan

fiduciaries as a matter of law, and the Court of Appeals affirmed.

All the record shows is that petitioners Hurwitz and Leone (like other officers of Pacific Lumber who were not sued) collected information regarding various insurance companies and annuity options, participated in discussions at meetings of the board of directors with respect to those providers, and voted as board members on the ultimate selection. Petitioners have not alleged that Pacific Lumber's information-gathering or discussion process constituted a breach of fiduciary duty. They challenge the selection decision. And there is no question that Hurwitz and Leone (along with a third board member) voted on the selection *in their capacity as members of Pacific Lumber's Board of Directors.* On this record, petitioners Hurwitz and Leone were in the same situation as those persons charged with being fiduciaries of an ERISA plan in *Confer v. Custom Eng'g Co.,* 952 F.2d 34 (3d Cir. 1991) who were held to be non-fiduciaries under Section 3(21)(A) of ERISA.

The "functional test" of fiduciary status cited by respondents cannot be applied in a vacuum, as a matter of law. It is necessarily fact intensive, and it cannot be met where, as here, the only "individual" act of "control" over the Plan's assets in the record was the casting of a vote as a member of the board of directors of a plan sponsor. To hold otherwise would gut not only the functional test, but the very concept

that entities as well as individuals can be fiduciaries of ERISA plans.

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Respectfully submitted,

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